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INSTITVTIONES

OR

INSTITUTES OF ROMAN LAW BY GAIUS

WITH A TRANSLATION AND COMMENTARY

BY THE LATE

EDWARD POSTE, M.A.

FOURTH EDITION, REVISED AND ENLARGED BY

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WITH AN HISTORICAL INTRODUCTION BY

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OXFORD

AT THE CLARENDON PRESS

MDCCCCIV

HENRY FROWDE, M.A.
PUBLISHER TO THE UNIVERSITY OF OXFORD
LONDON, EDINBURGH
NEW YORK

PREFACE

THE death of the author of this Commentary and Translation has taken from us one who in the intervals allowed him by his official duties gave himself with single-minded devotion to the acquisition and furtherance of knowledge. 'Omnium, quos cognovi, doctissimus' were the words in which Mr. Poste's great erudition was commemorated by the Vice-Chancellor of the University, the distinguished head of the distinguished College of which Mr. Poste was almost the senior Fellow; and certainly no one can read this Commentary without being impressed by the writer's philosophic spirit and extensive learning. It is especially remarkable that a scholar, who was never engaged in the teaching or practice of law, should have produced a legal textbook, which perhaps more than any other makes intelligible to English students the teaching of the great German masters of Roman jurisprudence and at the same time never fails to be interesting by reason of its own force and individuality.

In re-editing this well-known work, at the request of Mr. Poste's executors and of the Delegates of the Clarendon Press, my endeavour has been to preserve as far as possible the character which Mr. Poste himself gave it, while making such alterations as seemed to be required at the present time. As Mr. Poste never revised his Translation and Commentary with any completeness since they were first published, their revision for this edition has been a more considerable undertaking than would otherwise have been the case. It should be noticed that the part of the Commentary relating to analytic jurisprudence has been much curtailed in the present edition. This has been done by the advice of persons engaged in the teaching of Roman law at Oxford, who are of opinion that the insertion of so much matter bearing on the general theory of law has rendered the Commentary unnecessarily difficult to students and that the subject is one better left to independent treatises. The omission of the Preliminary Definitions on this account has made it possible to introduce into the book an Historical Introduction to Gaius, which has been written by Dr. Greenidge, who is well

known for his writings on Roman constitutional history, and for his special Treatises on 'Infamia' and on 'The Legal Procedure of Cicero's Time.'

The text of Gaius adopted is that of the last edition of Krueger and Studemund, which its German proprietors have again most kindly allowed us to use. In this text the numerous lacunae are only filled up, where from passages in the Institutes or other sources the missing words may be inferred, at least with a very high degree of probability. Some other conjectural readings, more or less followed in the Translation, will be found in the Appendix. It is to be hoped that in some future edition of this book a Critical Apparatus may be supplied by a competent hand. In the meantime the student should more especially refer to the notes on the text appended to Krueger's and Studemund's Gaius. He may also consult with advantage the notes to the late Professor Muirhead's edition of Gaius, though the valuable textual criticism to be found there requires revision in the light of more recent research.

In conclusion, I have to express my obligations to my old friend and pupil Mr. Ledlie, the translator of Sohm's *Institutes*, for many helpful suggestions. Another old friend and pupil, Dr. Potts, has also rendered me valuable aid, especially in the preparation of the Index and of the Chronological Table. My friends Dr. Schuster and Dr. Greenidge have given me useful information on several points about which I have consulted them.

E. A. WHITTUCK.

Claverton Manor, Bath,
October 17, 1904.

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EXPLANATION OF ABBREVIATIONS

Inst. Institutes of Justinian.

Dig. Digest or Pandects of Justinian.

Cod. Code of Justinian.

Nov. Novellae Constitutiones or Novels of Justinian.

The meaning of the numbers that follow these abbreviations will be obvious to any one who opens a volume of the Corpus Juris.

Pr. stands for principio, meaning, in the first paragraph of a title of the Institutes, or of a fragment of a title of the Digest, or of a 'lex' of a title of the Code.

The Commentaries of Gaius are referred to by numbers indicating the book and the paragraph: e.g. 2 § 5, indicates the 5th paragraph of Book 2. When the reference is to another paragraph in the same book, the book is omitted.

When Ulpian or Paulus are quoted, the works referred to are the Ulpiani Fragmenta or Excerpta ex Ulpiani Libro singulari Regularum, and the Sententiae Receptae of Paulus.

Fragm. Vat. Fragmenta Juris Romani Vaticana.

(For the Jus antejustinianum see Huschke's or Krueger's Collections of ante-Justinian legal writings.)

When Savigny, Vangerow, Keller, Bethmann-Hollweg, Ihering, Kuntze, Windscheid, Dernburg, Lenel, Sohm, Muirhead, and Roby are simply cited, the references are to Savigny, System des heutigen römischen Rechts; Vangerow, Lehrbuch der Pandekten; Keller, Der römische Civilprocess und die Actionen; Bethmann-Hollweg, Der römische Civilprozess; Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung; Kuntze, Institutionen und Geschichte des römischen Rechts; Windscheid, Lehrbuch des Pandekten-Rechts; Dernburg, Pandekten; Lenel, Das Edictum Perpetuum, ein Versuch zu dessen Wiederherstellung; Sohm, The Institutes—A Text-book of the History and System of Roman Private Law (translated by J. C. Ledlie), 2nd ed.; Muirhead, Historical Introduction to the Private Law of Rome, 2nd ed.; Roby, Roman Private Law in the times of Cicero and of the Antonines.

CHRONOLOGICAL TABLE

B.C.

753 Traditional Date of Foundation of Rome.

578–535 Servius Tullius. Division into thirty Tribes. Military Organization of Centuries. Institution of Census.

509 Office of Consuls instituted.

494 First Secession of Plebs. Institution of Tribuni Plebis.

451–448 Law of the Twelve Tables.

449 Second Secession of Plebs—
Leges Valeriae Horatiae.

445 Lex Canuleia, legalizing marriages between Patricians and Plebeians.

443 Censorship established.

366 Office of Praetor established.

326 Lex Poetelia about this time.

304 Cnaeus Flavius publishes forms of actions and calendar of dies fasti and nefasti.

300 Lex Ogulnia, admitting Plebeians to College of Pontiffs.

287 Last Secession of Plebs—
Lex Hortensia.
Lex Aquilia.

280 Tiberius Coruncanius (subsequently first Plebeian Pontifex Maximus), Consul.

242 First appointment of a Praetor Peregrinus about this time.

204 Lex Cincia.

198 Sextus Aelius Paetus (earliest commentator on the Twelve Tables), Consul.

170–150 Lex Aebutia probably enacted within this period.

169 Lex Voconia.

105 P. Rutilius Rufus, Consul.

95 Q. Mucius Scaevola (pontifex), Consul.

82 Sulla, Dictator.

89 End of Social War.
Leges Corneliae.

66 C. Aquilius Gallus, Praetor.

63 Cicero, Consul.

59 Julius Caesar, Consul.

51 Servius Sulpicius, Consul.

49 Accession of Julius Caesar to supreme power.
Lex Rubria.

45 Lex Julia municipalis.

44 Assassination of Caesar.

40 Lex Falcidia.

B.C.

27 Caesar Octavianus receives title of Augustus (first Constitution of the Principate).

23 Second and final Constitution of the Principate.

27–14 A.D. Principate of Augustus.
M. Antistius Labeo.
C. Ateius Capito.

18 Lex Julia de adulteriis et de maritandis ordinibus.

A.D.

4 Lex Aelia Sentia.

6 Lex Julia de vicesima hereditatium.

9 Lex Papia Poppaea.

14–37 Tiberius, Emp.
Masurius Sabinus.
Proculus.

19 Date to which Lex Junia (Norbana) is generally ascribed.

30 C. Cassius Longinus, Consul.

37–41 Caligula, Emp.

41–54 Claudius, Emp.—
Lex Claudia.
S. C. Claudianum.

46 S. C. Vellaeanum or Velleianum.

54–68 Nero, Emp.—
S. C. Neronianum.

62 S. C. Trebellianum.

68 Galba, Emp.
Vitellius, Emp.

68–79 Vespasian, Emp.

70 S. C. Pegasianum.

79–81 Titus, Emp.

81–96 Domitian, Emp.

96–98 Nerva, Emp.

98–117 Trajan, Emp.

117–138 Hadrian, Emp.
Edictum Perpetuum of Salvius Julianus.

138–161 Antoninus Pius, Emp.
First and part of second book of Gaius probably written at this time.

161–180 M. Aurelius Antoninus, Emp.
Institutes of Gaius probably completed under this Emperor.

178 S. C. Orfitianum.

180–193 Commodus, Emp.

193 Pertinax and Julianus successively Emperors.

193–211 Septimius Severus, Emp.

204 Papinian, praefectus praetorio.

A. D.

211–217 Caracalla, Emp.—
Papinian killed.
Edict of Caracalla—extending citizenship.
217–218 Macrinus, Emp.
218–222 Elagabalus, Emp.
222–235 Severus Alexander, Emp.
222 Ulpian, praefectus praetorio.
228 Ulpian killed.
235–238 Maximinus, Emp.
238 Gordianus I and II, Emp.
238–244 Gordianus III, Emp.
244–249 Philippus, Emp.
249–251 Decius, Emp.
251–253 Trebonianus Gallus, Emp.
253 Aemilianus, Emp.
253–260 Valerian and Gallienus, joint Emperors.
260–268 Gallienus, sole Emperor.
268–270 Claudius II, Emp.
270–275 Aurelian, Emp.
275–276 Tacitus, Emp.
276 Florianus, Emp.
276–282 Probus, Emp.
282–283 Carus, Emp.
283–284 Carinus and Numerianus, joint Emperors.
285 Carinus, sole Emperor.
285–286 Diocletian, sole Emperor.

A. D.

286–305 Diocletian and Maximian, joint Emperors.
305–306 Constantius I and Galerius, joint Emperors.
306 Constantius I, Galerius, and Constantine the Great, joint Emperors.
307–311 Galerius, Constantine the Great, and Licinius, joint Emperors.
311–323 Constantine the Great and Licinius, joint Emperors.
323–337 Constantine the Great, sole Emperor.
330 Constantinople, the seat of government.
337–340 Constantius II, Constantine II, and Constans I, joint Emperors.
340–350 Constantius II and Constans I, joint Emperors.
350–361 Constantius II, sole Emperor.
361–363 Julian, Emperor.
363–364 Jovian, Emperor.
364 Valentinian I and Valens, joint Emperors. They divided the Empire into the Western and Eastern.

A. D. — Western Empire.	A. D. — Eastern Empire.
364–367 Valentinian I, Emp.	364–378 Valens, Emp.
367–375 Valentinian I and Gratian, Emp.	378–392 Theodosius I, Emp.
375–383 Gratian and Valentinian II, Emp.	
383–392 Valentinian II, sole Emperor.	
392–395 Theodosius I, Emperor of East and West.	
395–423 Honorius, Emp.	395–408 Arcadius, Emp.
	408–423 Theodosius II, Emp.
423–425 Theodosius II, Emperor of East and West.	
425–455 Valentinian III, Emp.	425–450 Theodosius II, Emp.
426 Law of Citations.	
439 Codex Theodosianus.	
455 Petronius Maximus, Emp.	450–457 Marcian, Emp.
Sack of Rome by the Vandals.	457–474 Leo I, Emp.
455–456 Avitus, Emp.	474 Leo II, Emp.
457–461 Majorian, Emp.	474–491 Zeno, Emp.
461–467 Government practically in hands of the barbarian Ricimer.	491–518 Anastasius I, Emp.
	518–527 Justin, Emp.
467–472 Anthemius, Emp.	527–565 Justinian, Emp. Tribonian.
472 Olybrius, Emp.	528 Code ordered.
472–475 Julius Nepos, Emp.	529 Code published.
475–476 Romulus Augustulus, Emp. *End of Western Empire.*	530 Digest ordered.
	533 Digest and Institutes published.
	534 Revised edition of Code published.

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500 Lex Romana Burgundionum.
506 Lex Romana Visigothorum, or Breviarium Alarici, containing Epitome of Gaius.
511–515 Edictum Theodorici (Lex Romana Ostrogothorum).

HISTORICAL INTRODUCTION

In order to justify the character of this introductory essay it is necessary to say a few words about the intention with which it is written. The reader must regard it mainly in the light of an introduction to the Institutes of Gaius, not in the light of a disinterested sketch of the history of Roman Law. Had it been intended to have the latter character, both some of its omissions and some of its inclusions would be wholly unjustifiable. The most signal of the omissions is the neglect to give an adequate treatment to the stage of Roman Law which yields to no other in importance—the stage at which it passes from the religious to the secular sphere, from Fas to Jus. One of the chief questions which is, or should be, agitating students of Roman Law at the present day, is that of the period at which this transition was effected. For, if it is true that Roman Law retained its priestly character and its religious sanctions to a late period of the Republic [1], then the traditional history of the Twelve Tables is an improbability, and the account given by Cicero and other writers of the legislation and procedure of the Monarchy and early Republic is an anachronism. The student of Gaius, however, is not very intimately concerned with this far-reaching historical question ; and I have been content to state my general adherence to the traditional view without attempting to justify it by evidence.

Amongst subjects included in this sketch, which have little direct bearing on the history of Roman Law, I may mention the descriptions of the structure of the different Comitia at Rome and the account of the manner in which the powers of the Princeps were conferred. From the point of view of the general history of the civil and criminal law in a State it is not of much importance to determine the particular mode in which a legislative assembly is constituted, or the precise manner in which a sovereign (whether nominal or real) is invested with his authority. But these historical questions do to some extent underlie subjects which are treated by Gaius ; and, as it was not found convenient to deal with them at any great length in the commentary, a place had to be found for them in this introduction.

[1] This thesis has been vigorously maintained by Lambert in his work *La fonction du droit civil comparé* (1908).

§ 1. *The Unification and Extension of Roman Law.*

The history of Roman Law begins for us with the traditions that have been preserved concerning the Roman Monarchy. The existence of a Monarchy such as that described for us by annalists like Livy and Dionysius, implies the existence of a consolidated State, with a central legislative and executive power and a tolerably uniform system of law. In the Monarchy, however, and even in the early Republic it seems that the system of law was not marked by perfect uniformity, since the two classes of Patricians and Plebeians, which made up the Roman State, appear to have been distinguished, not only by the possession of different political privileges, but also by the possession of different systems of customary law[1]. It is even possible that a further divergence of practice may have existed in the most primitive society, or societies, out of which the City and Monarchy of Rome developed—that a considerable amount of autonomy in legal relations may have existed in the Clans (Gentes) and Villages (Vici), out of which the earliest Rome was formed. The history of Roman law, from its beginning to its close, would thus be marked by a process of gradually increasing unification. First the customs of the Clans were merged in the customs of a State; but this State consisted of two classes, Patricians and Plebeians; and each of these classes seems to have had a customary law of its own. Then an attempt was made to create a uniform system; and this uniformity was probably secured by making patrician law approximate as closely as possible to plebeian—the law of the few to the law of the many. A further advance was made when Rome had become the mistress of Italy. Italian customs were made ultimately to conform to those of the leading State, and the free cities of Italy became the municipalities of Rome. Lastly, Rome had created an Empire. For a very long period she adopted the wise and cautious policy of recognizing, as far as possible, the local and tribal law of the cities and peoples under her control. The recognition of this local or tribal law was not, however, merely a symptom of the favourite Roman principle of non-interference. It was also a sign that the privileges of Romans and Italians were not possessed by provincials; for the conferment of Roman citizenship, or even of Latin rights, necessarily carried with it the use of the forms of Roman Private Law[2]. Hence, when a time came at which Rome was willing to raise States or individuals in the Provinces to a level

[1] See p. xix.

[2] The Latins possessed *commercium* and some of them *conubium*. Full citizenship would also be possessed by a considerable class in Latin towns, i. e. by all who, through holding a magistracy, had become Roman citizens.

with her own citizens, the law of Rome came to take the place of the territorial or tribal law of these political units. The process of a thorough imperial unification by means of a common system of Roman Private Law had begun.

§ 2. *The Epochs in this process of Unification and Extension.*

The dates of the three epochs which we have touched on can only be vaguely indicated. We have no knowledge of the year, or even of the century, when the smaller political units, out of which Rome was formed, became so thoroughly marshalled under the rule of a common government that the customs of the Clans were made to conform to the principles laid down and enforced by a single superior authority. For the second epoch—the period, that is, at which an attempt was made to secure a uniform system of law which would be binding equally on Patricians and Plebeians—tradition does supply a date, one, however, that has more than once been doubted by modern writers on Roman History and Law[1]. This traditional date is comprised in the years 451–448 B.C., years which the Romans believed to mark the creation of the Decemviral Commission and the publication of the Law of the Twelve Tables. The third tendency—that of the unification of Rome with Italy,—although it had begun to be felt in isolated cases from a very early period of Roman History, may be said to have received its final impulse at the close of the great war for Italian freedom, generally known as the Social war, in 89 B.C. The last epoch—that of imperial unification—may be said to have been ushered in by the accession of Caesar to supreme power in 49 B.C. It had not been closed even by the time of Gaius, about the middle of the second century A.D.; for, even at that late period the Eastern part of the Empire still abode by Eastern forms of law[2]. It may even be questioned whether the Edict of Caracalla, which is believed to have extended Roman citizenship to all the free inhabitants of that portion of the world that was ruled by Rome,

[1] Pais, in his *Storia di Roma*, has stated the view that the Decemviral Legislation has been antedated by about a century and a half. He brings it down to the close of the fourth century B.C. He believes that Appius Claudius, the Decemvir, is a duplicate of Appius Claudius, the censor of 312 B.C., and that the story of a publication by the Decemvirs is a duplicate of the story of the revelation of the forms of Law by Cn. Flavius in 304 B.C. Lambert has gone still further in a view expressed in three works (*La question de l'authenticité des XII Tables et les Annales Maximi*; *La fonction du droit civil comparé*; *L'histoire traditionnelle des XII Tables*). He thinks that the Twelve Tables, as a code, originated with Sextus Aelius Paetus, consul in 198 B.C., whom tradition regards as their earliest commentator, although he admits that there may have been successive partial compilations before this date.

[2] Mitteis, *Reichsrecht und Volksrecht*.

between the years 212 and 217 A.D., really eliminated all the local varieties of customary law. Local customs tend to die hard, and it was never in the spirit of the Roman Empire to suppress them. The legal unity of the Empire was always more strongly marked in the matter of Procedure than in the matter of Substantive Law. The processes of the Courts were the same for every Province at a time when the greatest varieties of customary law were recognized by these courts.

§ 3. *Stages of Roman Legal History—The Clan and the Family—Evolution of individual rights.*

We may now attempt to treat in greater detail the stages of Roman Legal History which we have outlined. The earliest stage—that marked by the independent or almost independent life of the Clan or Gens—is one for which, by the nature of the case, no definite historical evidence exists. The reality of such a life is merely an inference drawn from the characteristics of the Gens as it appears before us in the historical period. These characteristics seem to prove that the Gens is not a really primitive institution, but a late and advanced stage in the social development of the Latin races; but, on the other hand, they may show that it was in many respects a more primitive unit than the State; that is, that it exercised rights and duties which were ultimately exercised by the State. No political society worthy of the name can deal with Clans as the subjects of rights; it can deal only with Families or Individuals. Hence, if the Roman Gens ever lived a strong corporate life, the authority of the Roman State must in those days have been weak.

The organization of the Gens was based on the patriarchal idea in its extreme form; that is, on the conception that relationship is only binding when it can be traced through the male line. And this is the fact which seems to prove that the Gens marks a late and mature stage in the development of Latin societies; for the patriarchal idea is not one that is readily grasped by the mind of primitive man. Yet, late as the Gens is when considered in reference to the prehistoric development of the Latin race, it perhaps possessed, before the very dawn of history, a unity and power of its own, of which but pale reflections survive in the historical period. In historical times the only test of unity was the common name borne by the Gentiles [1]; the chief signs of corporate action were their guardianship of the insane and their reversionary right of guardianship over women and children [2] — powers which the Gentiles must have

[1] Cic. *Top.* 6. 29 'Gentiles sunt inter se, qui eodem nomine sunt.'
[2] [Cic.] *ad Her.* i. 13. 23; Cic. *pro Domo*, 13. 35; Gaius, i. 157, ii. 47.

exercised by delegating their authority to a personal representative. The further right which they possessed in later times, of succeeding to intestate inheritances in the last resort [1], was perhaps a right possessed by individual members of the corporation rather than by the corporation itself. But a corporate activity far greater than this has been suspected for earlier times. There is indirect evidence that all Private Land (Ager Privatus) was at one time owned by the Gentes, not by families or individuals [2], and the view that the primitive Roman Senate was in some way representative of the Gentes is in accordance with the belief of Roman antiquity [3]. The fact that the primitive Roman State was in many ways conditioned by its clan organization seems to be certain. As the State grew stronger, it substituted the Family for the Clan. Between the two there is only a difference of degree. The Family (Familia) is the aggregate of the members of a household under a common head, the Paterfamilias; whereas the Gens is the aggregate of all individuals who bear a common name and who, therefore, if their ancestry could be traced in the male line through all its stages, would be found to be the descendants of some ultimate common ancestor. But the Familia is a far smaller, and therefore a far less powerful, unit than the Gens. It cannot so effectively dominate the State or impede its activities [4]. Again, the heads of families are many in number; the heads of the Gentes (who must have existed at the time when the Gens was the important unit) were necessarily few. The State which deals with families deals with a multitude of individuals, not with an oligarchy representing the interests of a number of corporations. The conception of individual rights, in their modern sense, was, it is true, never fully recognized in Roman Private Law. It was impeded by the Patria Potestas—the life-long power of the father over the son. But much was ultimately done to lessen the rigour of this patriarchal rule; and the principles of Roman Law were finally extended to races which knew nothing of the Patria Potestas. This law ultimately gave the most perfect expression hitherto witnessed by the world of rights which were both universal and individual. The existence of the Empire gave Rome the power, possessed in as high a degree by no other State, of dealing with the individual on universal lines, because she was not hampered by the barriers between man and man thrown up by separate national institutions.

[1] Ulpian in *Collatio*, 16. 4. 2; cf. Gaius, iii. 17.
[2] Mommsen, *Staatsr.* iii, p. 28 foll.
[3] Cic. *de Rep.* ii. 20. 35; Liv. i. 35.
[4] See *Daily News*, Sept. 5, 1901 ('The Genius of Rome').

§ 4. *Early Religious Law (Fas)—The Leges Regiae—The Secularization of Law.*

A process, which runs parallel with that which we have just described, is the process by which Roman Law came to be secularized; the process, that is, by which human were gradually substituted for divine sanctions. The customary law of a primitive society is either identical with, or developed from, some form of belief which implies the omnipresence of the gods and their detailed interest and activity in human affairs. In primitive Rome the pleading (actio) of the litigant in a civil suit is a religious chant, every word and cadence of which must be learnt from the priest; the wager (sacramentum), by which the process is stated, is a gift to a temple, and is probably conceived as an atonement for the involuntary perjury of the man who loses his case [1]; the penalties of the criminal law are means of expiating the anger of the gods, the severest form of atonement being the sacrifice of the sinner on the altar of the deity whom he has offended [2]. Rome in the historical period still preserves many traces of these beliefs of her infancy. They are found in the respect for the Auspices, in the conservatism which maintained the cumbrous forms of the old pleadings (actiones) and the custody of these forms by the Pontifical College; in the varied methods by which crime or sin is punished, some offences being reserved wholly for the secular courts, others being visited by the judgments of the Pontifical College, others again being subject to the milder chastisement of the Censor before he performs the religious rite of Purification (Lustratio). But the belief of the Romans themselves was that, in the very earliest stages of their recorded or imagined history, the primitive epoch of complete subservience to religious forms, if it ever existed, had been already passed, and that even in the time of the Kings something approaching a clear line could be drawn between the functions of Religious Law (Fas) and those of Secular Law (Jus). At the close of the history of the Republic there could be shown, in contradistinction to the great secular code of the Twelve Tables, a collection of religious ordinances, believed to be even more ancient than this code, and known as the Laws of the Kings (Leges Regiae) [3]. These laws are not represented as having formed a code, but merely a compilation. They were believed to be regal ordinances, issued by different Kings,

[1] See Danz, 'Das Sacramentum und die lex Papiria,' in *Zeitschr. f. R. G.* vi (1867), p. 339 foll.; *Der sacrale Schutz*, p. 151 foll.

[2] This must have been the original meaning of the *consecratio capitis*, the penalty of the *leges sacratae*. See Liv. iii. 55; Festus, p. 318; Bouché-Leclercq, *Les pontifes de l'ancienne Rome*, p. 196.

[3] The extant Leges Regiae are to be found in Bruns, *Fontes juris Romani antiqui*, I. 1.

which had been collected in the early days of the Republic by a Pontiff named Papirius[1]. It was held that they had been publicly exhibited in Rome, and were restored, like the Twelve Tables, after the burning of Rome by the Gauls (390 B.C)[2]. At the end of the Republic the compilation was edited, perhaps to some extent revised, by a scholar named Granius Flaccus, who is believed to have been a contemporary of Caesar[3]; but there is no reason for supposing that Flaccus introduced any essential alteration in the tenor of the ordinances. These ordinances, in the form in which they have been preserved to us, bear the strongest internal marks of their genuineness. Some of the provisions which they contain are quite prehistoric and could never have been valid at any period of the history of the Republic. Others deal with purely religious observances, which may belong to any date, but may be as early as the city of Rome itself. The Royal Laws, in fact, contain a series of ordinances, dealing with social, moral and religious life, such as may have been issued over a long period of time by the College of Pontiffs. It is not likely that all of these rules really go back to the epoch of the Kings; but many of them must do so, for they reflect an extremely primitive stage of culture and religious belief. In fact, one of the most surprising features of the Royal Laws is their lack of significance for the ordinary current of Roman life, as it was lived in the historical period. Where they are not a dead letter, they refer only to slight and exceptional contingencies, to the bare outline of the political life of the State and to the faintly defined structure of its hierarchical organization; whereas the Law of the Twelve Tables is a great living force, which pervades the whole of Roman business life. The Royal Laws reflect on the whole the rule of Fas; the Twelve Tables almost entirely the rule of Jus. A comparison of the former compilation with the latter code, in regard to their respective influences, exhibits more effectively than any other evidence could do the triumph of secular over religious law even in the early period of the Republic.

§ 5. *Jus—Its different forms as exhibited in Procedure.*

The counterpart to the rule of Fas is the rule of Jus. Jus seems originally to have meant 'That which is fitting'[4], and the word

[1] Dionys. iii. 36; Pompon. in Dig. 1. 2. 2. 36. [2] Liv. vi. 1.

[3] Paulus in Dig. 50. 16. 144; Censorinus, *De Die Nat.* iii. 2.

[4] Clark, *Practical Jurisprudence*, p. 17. Nettleship (*Contributions to Latin Lexicography*, p. 497) enumerates the following senses of *jus* in Latin literature:—(1) a law court (e.g. in the phrases 'In jus ducere,' 'Res est in jure'), (2) a bond or tie (e.g. in the phrases 'Jus amicitiae,' 'Jura necessitudinis'), (3) power, authority, (4) right to do a thing, (5) law, or a system of law, (6) what is right and fair, (7) the plural *jura* means either (a) rights or (b) rules of law, ordinances, decisions, and so authority.

never necessarily conveys the implication, contained in the word Law, that the thing it describes is the result of enactment by a Sovereign. It conveys rather the idea of valid custom, to which any citizen can appeal, and which is recognized, and can be enforced by, a human authority. Jus is a nugatory thing, a vain abstraction, until it can be realized; it is a thing recognized only in practice; and so indissolubly were the ideas of Right and Satisfaction connected with one another in the minds of the Romans that they used the same word 'Jus' for Right and for Court[1]. This association of ideas gives us the clue to the fact that the only possible method of distinguishing between the different kinds of Jus is by appealing to Procedure. In early societies, where there is no science of Jurisprudence, the only way in which the distinctions between different kinds of law—public and private, civil and criminal—can be exhibited, is by pointing to the fact that different kinds of mechanism have been created for satisfying different kinds of claims. Thus the characteristics of private law are those of a civil suit. Here the action can be brought only by the injured party or his representative, the satisfaction recovered belongs to the injured party, the Court which gives the satisfaction is composed of some arbitrator or judge (arbiter or judex) chosen by the consent of the parties, but approved by the judicial magistrate who represents the State. Criminal Law may similarly be defined in terms of Criminal Procedure. Here the wrong done is regarded as inflicted, not merely on the individual injured, but through him on the State. The State, therefore, will not depend on the initiative of the injured individual to undertake the prosecution. It can either be taken up by any citizen, or is regarded as the peculiar duty of a magistrate. The magistrate is often both prosecutor and judge. The defendant has no voice in the selection of the Court. The Court consisted, in the earlier procedure at Rome which never became wholly extinct during the Republic, of a magistrate representing the State, or of the State itself in the form of the Sovereign Assembly of the People; at a later period, of a select body of Judices with a President (Quaesitor), both Judges and President being created by statute. The satisfaction recovered from the defendant in such a trial, if it takes the form of a fine, belongs not to the aggrieved individual but to the State; if it assumes the form of punishment which is not pecuniary, such punishment is inflicted by the State. The third class of occasions on which the State intervenes to correct a wrong or to chasten an individual, is that governed by the rules of Administrative Law[2]. The procedure springing from this Law has analogies both to civil

[1] See note 4, p. xv.
[2] On this branch of Public Law see Mommsen, *Staatsr.* i, p. 172.

and to criminal jurisdiction. Administrative jurisdiction has as its object either the enforcement of a personal service to the State on an individual, or the exaction of a debt which he owes to the State. The obligation to service is generally enforced by a fine imposed by the magistrate. But whether what is demanded by the State takes the form of personal service or a pecuniary debt, the characteristic of Administrative jurisdiction at an early period of Roman History is that the magistrate who represents the State has a double character. He is not only prosecutor or plaintiff but also judge. This principle, however, was eventually modified. If the fine imposed exceeded a certain limit, an appeal to the People was allowed[1]; and, later still, the penalty might be sought either by a magistrate or a common informer before a civil court[1]. When a debt to the State was the object of dispute, the custom may eventually have been established that the magistrate should not himself judge, but should appoint for this purpose a panel of those assessors of debts or damages who were known as Recuperatores[2].

The question as to what particular cases shall fall under each of these three heads of Civil, Criminal and Administrative Law is one that is answered differently by different political societies; and Rome herself gave different replies to this question at various periods of her history. But we know of no period in the life of Rome when the distinction between these three types of Law and Procedure was not clearly grasped, and expressed by the higher judicial authorities, who were at Rome in a very real sense the makers of law.

§ 6. *The ultimate sources of Jus—The Monarchy and the Early Republic.*

The problem of the ultimate source and sanction of Jus was not one that troubled the Roman to any appreciable degree at any period of history. He was content to regard it as the product of Custom assisted by Interpretation. At a later period he supplemented it by acts of Legislation; but, even when he did so, he was much less concerned with the words of the enactment than with the manner in which these words were interpreted. Scarcely any people has had less of a gift, or natural inclination for, scientific legislation or the formation of a Code. The Roman's dependence on authority and skilled interpretation was, therefore, great; and this authority and power of interpretation are believed to have been represented, in the

[1] This procedure is illustrated by the Lex Bantina (Bruns, *Fontes*, iii. 9). It is there ordained 'Eam pequniam quei volet magistratus exsigito. Sei postulabit quei petet, pr(aetor) recuperatores . . . dato . . . facitoque joudicetur.'

[2] Compare the procedure ordained by the *Lex agraria* of 111 B.C. (Bruns, *Fontes*, iii. 11), ll. 36–39.

earliest times, by the King and the College of Pontifices. Justice could only be obtained by a litigant who knew the formularies of action, precise verbal accuracy in which was necessary for the successful conduct of a suit [1]. But this knowledge could be obtained only from the King and his Pontiffs. The King, too, must have given the ruling in law which determined what form of action should be employed [2]. Even at this early period the private Judex or Arbiter may often have been used for the final settlement of a suit [3]; but the King must have assisted in his appointment; and his judgment must have been conditioned by the preceding form of action which the King and the Pontiffs had thought appropriate to the suit.

The change from Monarchy to Republic could have made little difference in the manner in which the law was revealed to the Roman litigant, except in so far as this change may have increased the power of the College of Pontiffs. The annual tenure of the consulship, and the fact that each occupant of this office was hampered by a colleague, prevented the new magistracy, which was supposed to give the forms of Jus, from exercising over its skilled advisers the authority which had been once wielded by the King; and the patrician aristocracy, each member of which might be a consul or a pontiff, must now have attained a solidarity which it had never known before. The tendency of this aristocracy was to close up its ranks and to assert a monopoly, not only of office, but of knowledge of the forms of law.

§ 7. *Patricians and Plebeians.*

Had Rome been a homogeneous community, there would perhaps have been no agitation for the revelation of the principles of law which underlay the forms of procedure, and there would therefore have been no tendency towards an early codification. But Rome was composed of two communes, not of one. There was a Plebs within the Populus; and this Plebs possessed a solidarity which gave it the means of lifting up its voice in a demand, not for power, but for the protection of legal rights, and for the knowledge which was essential to that protection. The origin of the Plebs is wholly unknown. The favourite assertion of modern writers, that the Plebeians were a class which had emerged from a condition of clientship to the Patricians, does very little to solve the problem of the origin of the former class, except in so far as it suggests that some of the Plebeians were inhabitants of conquered cities that had been deported to Rome, and that others were voluntary sojourners from

[1] Gaius, iv. 11. [2] Cic. *de Rep.* v. 2, 3.
[3] Savigny, *System des röm. Rechts*, vi. p. 287; Bernhöft, *Staat und Recht der Königszeit*, p. 230.

distant cities who were protected by the government and the patrician clans. But it seems impossible that causes such as these could have led to the creation of a mass of men that appears in early Roman history as forming the bulk of the community; and it is possible that further evidence (archaeological and ethnological) may show that the distinction between Patricians and Plebeians is one based on race, and that the existence of the Patricians as a governing class is the result of the conquest of a native race by bands of immigrant wanderers[1]. Throughout Roman law there is a curious persistence of dual forms for the attainment of the same end which may be a survival of two distinct systems of customary law possessed by different peoples, the conquerors and the conquered. Thus we have the Sponsio side by side with the Nexum, marriage by Confarreatio side by side with marriage by Usus or Coemptio, the testament in the Comitia Calata side by side with the testament 'per aes et libram.' The procedure 'by the copper and the scales,' in the manifold forms which it assumes, seems to be especially a characteristic of the popular law of the commons. The exclusion of the Plebeians from the magistracy and the priesthood, and the denial to them of the right of Conubium with Patricians, may also point in the direction of a fundamental racial distinction between the two classes. But the disabilities consequent on this racial distinction, if we suppose it to have existed, were by no means limited to the domain of public rights. They pervaded the whole of Roman life to such an extent that there is considerable justification for the view that the early condition of the Plebeian was very like that of the client. In the first place, the Patricians maintained that they alone formed Gentes, and the condition of being a member of a Gens, or Gentilis, was that the man who made the claim should be able to point to a perfectly free ancestry[2]. In this claim of the Patricians we therefore have the implication that the ancestors of the Plebeians were not free. In all respects but this, the Plebeians formed Clans just like the Patricians. A group of Plebeians who bore a common name formed a Stirps, but this Stirps was supposed to be a mere offshoot of some patrician Gens on which it was held to be dependent. It possessed no independent rights of its own. A group of Plebeians who could trace their ancestry back to a common

[1] Compare Ridgeway, *The early age of Greece*, p. 257. 'We may conclude that the two main elements in the population of early Rome were the aboriginal Ligurians, who formed the Plebs, and the Umbrian Sabines, who formed the aristocracy.' The evidence is perhaps not sufficient to warrant so definite a conclusion; but the more that I have dwelt on the lack of homogeneity in early Roman life, the more definite has become my conviction that we have to deal with racial, not merely with social, differences.

[2] 'Gentiles sunt . . . quorum majorum nemo servitutem servivit' (Cic. *Top.* 6. 29).

head were called Agnati; but these Agnati had not the rights of inheritance, or perhaps the other family rights, possessed by the Gentiles. The rights of plebeian Agnati were recognized by the Twelve Tables; but this was perhaps the first recognition that they gained. In the second place, of the two rights which were subsequently considered as forming the minimum conditions of citizenship, the Jus Conubii was, we know, not possessed at all by Plebeians, and it is probable that they possessed the Jus Commercii in a very imperfect form. We cannot, it is true, point to a time when no Plebeian could conclude a contract, or bring an action, unless, like a client, he acted through a patron. But it is probable that in early times he had a very limited capacity for controlling land; that he held the ground, which he worked for himself, merely on sufferance (Precario), and not in virtue of his civic right (ex Jure Quiritium)[1]. This seems proved by the fact that he was not originally liable to service in the legions[2]: for there can be little doubt that such service was a burden imposed on landowners[3]. It seems that the one great condition which led to the rise of the Plebeians as a power in the State was the recognition of their rights as independent holders of land. This recognition was accorded because their services were required as soldiers in the legions and as tax-payers. They could now hold and dispose of Res Mancipi; that is, those kinds of property which were assessed at the Census (Res Censui Censendo)[4] and which, as being liable to such assessment, required peculiar methods of transfer as evidence of ownership. This change must have preceded or accompanied the great epoch of reform which is associated with the name of Servius Tullius.

§ 8. *Acquisition of voting rights by Plebeians—Assemblies of the Populus and of the Plebs.*

When the army was made the basis of the new Comitia Centuriata, the wealthier Plebeians who were members of the army gained a vote; and the Comitia Curiata, originally patrician, must soon have come to admit members of the Plebs. But this voting power did little good to the class as a whole. Its true strength lay in its military organization. The first secession was an incident in a campaign; and it is not surprising that the officers whom the Plebeians appointed to protect their persons against the patrician

[1] Cf. Savigny, *Recht des Besitzes* (seventh edition), p. 202.
[2] If we believe that the Servian census was intended to create liability to service for Plebeians. Cf. p. xxv.
[3] This seems shown by the continuance of the use of the word *assidui* for the members of the Servian Classes.
[4] Cic. *pro Flacco*, 32. 80.

magistrates, bore the military name of Tribuni. The creation of the Tribunate gave the Plebs a political organization, and was the starting-point of that dualism which runs through the whole of the Roman constitution—a dualism expressed in the distinction between the Comitia of the People and the Concilium of the Plebs, between Lex and Plebiscitum, between Magistratus Populi and Magistratus Plebis, between the Imperium of the one and the Sacrosanctitas of the other. The tribunes, however, could offer only personal assistance to outraged individuals, and though they proved a potent channel for the petitions of the Plebs as a whole, they were a very ineffective means of protecting the private rights of individual members of this order. Effective protection was in any case impossible until a fuller light had been thrown on the question what the rights to be protected actually were. Hence the demand for the publication of the principles of the law on which the jurisdiction of the patrician magistrates was based.

§ 9. *Unification of the Law by means of the Twelve Tables.*

The story of the creation of the Decemvirate and the formation of the Code of the Twelve Tables, which has come down to us in a highly picturesque and legendary shape, presents us with the picture, first of a prolonged agitation of ten years (462–452 B. C.) maintained by the tribunes of the Plebs, then of a commission sent to gain knowledge of Hellenic codes, next of the appointment of two successive boards of Decemvirs for the years 451, 450 B. C., and finally of the ratification of the Code by the Comitia Centuriata and of its publication, in its completed form, by the consuls of 448 B. C.[1] The Greek influence on the Code[2], although slight, is undeniable, because it was unavoidable. It may not have been gathered, in the way affirmed by tradition, by the appointment of a commission to inspect the systems of law of different Hellenic states; but it was, at the least, an inevitable result of the prolonged influence of the civilization of Magna Graecia[3], to which Rome had been subject from the days of her infancy—an influence which successively moulded her army, her coinage, her commerce and her literature. Again no State, however self-centred, could dream of undertaking such an enterprise as a written system of law without glancing at similar work which had already been accomplished by neighbouring cities. But, in spite of the fact that some of its outline and a few of

[1] Liv. iii. 57.
[2] See Pais, *Storia di Roma*, i. 1, p. 584. He describes the law of the Tables as the result of a fusion of the rude national law with the more civilized dispositions of Greek culture.
[3] Cf. Voigt, *XII Tafeln*, i, p. 14.

its ideas may have been borrowed from Greek sources, the Law of the Twelve Tables is thoroughly Roman both in expression and in matter. The form of expression is, it is true, not that of later Roman legislation—complicated, technical, obscure. Had it been so, the Twelve Tables could scarcely have survived. It was the form that was current in the verbal juristic maxims of this and a later period—brief, gnomic, rhythmic and imperative [1]. As to the matter, that was conditioned by the task which the Decemvirs had to perform—a task which they accomplished with an astonishing degree of success. Their object was to make a common law for Roman society considered as a whole. It was no business of theirs to abolish patrician privileges or to remove the peculiarities of patrician ceremonial; but they had to find a system of Jus which would be equally valid for all Romans; and this they naturally found in the customary law of the mass of the people; that is, of the Plebs. They were forced to recognize a social disability of the Plebs, as exemplified in the absence of Conubium with Patricians [2]; for to remove it would have been an alteration of the Constitution as well as an infringement of patrician rights. But how completely they ignored the existence of the Plebs as a separate political community is shown by the fact that the tribunes do not seem to have been mentioned in the law at all. The assumption probably was that the publication of the Code should render the Tribunate unnecessary; and this it might have done, had the patrician government lived up to its promises.

The law of the Twelve Tables, as the 'body of the whole of Roman law' ('corpus omnis Romani juris') and the 'fountain of all public and private law' ('fons omnis publici privatique juris')—designations both of which are applied to it by Livy [3]—contained ordinances on all the three branches of Jus, civil, criminal and constitutional. In the matter of civil law, we find regulations as to marriage and family relations, inheritance, testamentary disposition, debt and usury. The marriage recognized was that known as the result of *usus*—a contract, that is, which was concluded by consent and strengthened by prescription [4]. It was ordained that the threefold sale of a son by his father should issue in the freedom of the son [5]: although whether the Twelve Tables made this form of emancipation the basis of adoption is uncertain. The manumission of slaves who had been left free by testament, on the condition of purchasing their freedom, was also facilitated [6]. Recognition was

[1] Cf. Diod. xii. 26 *ἡ δὲ γραφεῖσα νομοθεσία, βραχέως καὶ ἀπερίττως συγκειμένη, διέμεινε θαυμαζομένη μέχρι τῶν καθ' ἡμᾶς καιρῶν.*

[2] Cic. *de Rep.* ii. 37, 63.

[3] Liv. iii. 34.

[4] Gaius, i. 111.

[5] Gaius, i. 132.

[6] Ulpian, *Reg.* ii. 4.

given to testamentary disposition as performed 'per aes et libram'[1]; while, in the matters of intestate inheritance and guardianship, the rights of the Agnati, common to Plebeians and Patricians, were regarded as prior to those of the Gentiles[2]. The harsh law of debt, which was a result at once of freedom of contract and of the very severe view which ancient societies take of the defaulting debtor, was maintained; the Judicatus still became the bondsman of his creditor[3], but now (perhaps for the first time), all the stages of the process of execution were published to the world, the rights of the creditor were defined, the chances of escape open to the debtor were accurately described. Loans on interest were permitted; but the maximum rate of interest was fixed at 'unciarium foenus'[4] (probably ten per cent.); and the usurer who exceeded this rate was punished more severely than the ordinary thief; he was compelled to restore fourfold[5]. With respect to Civil Procedure (the exclusive knowledge of which had been one of the greatest elements of strength in the patrician government) it is clear that the outlines of the process—such as the rules for the summons of parties and witnesses, and for the length of the trial[6]—were described. But it is very questionable whether the Tables went so far as to specify the Forms of Action; the actual words and gestures, that is, which had to be employed in any given case. We find a tradition that these forms were not revealed until nearly 150 years later, and that they were first given to the world in 304 B.C. by a certain Cnaeus Flavius[7], a freedman's son and the clerk of Appius Claudius, the censor of 312 B.C., who was apparently also pontiff. But the traditions connected with the publication at Rome, even of the simplest information about Procedure, are exceedingly obscure. On the one hand, we hear that this same Cnaeus Flavius published a Calendar which gave a record of Court Days (Dies Fasti)[8]; on the other hand, it was believed that a Calendar of some kind had been already published by the Decemvirs[9]. It is possible that the decemviral Calendar had become antiquated, or that it had not been restored or republished after the burning of Rome by the Gauls (390 B.C.)[10]; but it is clear that the Romans of Cicero's time had much vaguer ideas about the epoch at which the forms of Procedure were made accessible to the public, than they had about the date at which the principles of Substantive Law were given to the world.

[1] Cic. *de Inv.* ii. 50. 148; [Cic.] *ad Her.* i. 13. 23; Gaius, ii. 224.
[2] Ulpian in *Collatio*, 16. 4. 2.
[3] Gell. xv. 13. 11; xx. 1. 45.
[4] Tac. *Ann.* vi. 16.
[5] Cato, *de Re Rust.* praef.
[6] Bruns, *Fontes*, i. 2, Tab. i.
[7] Cic. *de Or.* i. 41. 185; *ad Att.* vi. 1. 8; Liv. ix. 46. 5.
[8] Cic. *ad Att. l. c.*; *pro Mur.* 11. 25; Liv. *l. c.*; Plin. *H. N.* xxxiii. 1. 17.
[9] Macrob. i. 13. 21.
[10] Liv. vi. 1; Cic. *ad Att. l. c.*

The criminal law of the Twelve Tables reflects a more primitive stage of thought than its civil ordinances. But this is not surprising; for, throughout the whole of Roman History, the criminal law lags far behind the civil. The Tables recognize the principles of self-help and retaliation. A limb is to be given for a limb; but for minor assaults pecuniary compensation is allowed [1]. We still find the idea of capital punishment taking the form of an expiation to an outraged deity; thus the man who destroyed standing corn by night was hanged as an offering to Ceres [2]. The belief in witchcraft still survives; for death is the penalty for incantations [3]. It is also the penalty on the judex who has taken bribes, and for treason (Perduellio) in the form of 'rousing an enemy against the State or handing over a citizen to the enemy [4].'

But it is where criminal law touches questions of personal liberty, and is connected with constitutional law, that the legislation of the Twelve Tables is most advanced. The principle of the Appeal to the People (Provocatio) against the sentence of the magistrate was maintained [5]; it was enacted that no law or sentence should be passed to the detriment of an individual (Privilegia ne inroganto) [6]; and it was laid down that no capital sentence could be issued except by 'the greatest of the Comitia' (nisi per maximum comitiatum) [7]; that is, by the Assembly of the Centuries, or Exercitus, gathered in the Campus Martius.

An important aspect of the Public Law of the Twelve Tables is the guarantee of the right of free association, provided that it have no illegal intent. While nocturnal gatherings (coetus nocturni) are prohibited [8], the formation of gilds (collegia) is encouraged. Such gilds were to require no special permit for their existence, and the rules which they framed for their own government were to be valid, provided that these rules were no infringement of public law [9].

Lastly, the most typical and important utterance of the Tables is to be found in the injunction that 'the last command of the People should be final [10].' It is an utterance which shows how little the Decemvirs regarded their own work as final, how little they were affected by the Greek idea of the unalterability of a Code, of a Code forming a perpetual background of a Constitution—in fact, by the idea of a fixed or written Constitution at all. It is an utterance that expresses the belief that law is essentially a matter of growth, and

[1] Gell. xx. 1. 12–14. [2] Plin. *H.N.* xviii. 3. 12. [3] Cic. *de Rep.* iv. 10. 12.
[4] Marcian in Dig. 48. 4. 3. [5] Cic. *de Rep.* ii. 31. 54.
[6] Cic. *de Leg.* iii. 4. 11. [7] Cic. *de Leg.* *l. c.*
[8] *Decl. in Catil.* 19. [9] Gaius in Dig. 47. 22. 4.
[10] 'Ut quodcumque postremum populus jussisset, id jus ratumque esset' (Liv. vii. 17).

prepares us for the fact that Rome saw no further scheme of successful codification until nearly a thousand years had passed.

§ 10. *Future Progress of Law. Legislation and Interpretation; the Legislative Assemblies.*

For the future the progress of law was to depend on the two processes of legislation and interpretation. The legislative assemblies were those of the Populus and the Plebs. The Populus, which comprised the whole of the Roman people, Patricians as well as Plebeians, met, either by centuries, as the Comitia Centuriata, or by tribes, as the Comitia Tributa, under the presidency of a Consul or Praetor.

The Comitia Centuriata was an assembly that had grown out of the army-organization of the whole Roman people. It was the whole Host or Exercitus expressing its political will. It was for this reason that the military unit (the centuria) was the voting unit. And this was also the original reason why we find in this assembly the division into classes, or aggregates of citizens grouped together on the basis of a particular property qualification; for the different types of military service were originally determined by degrees of wealth. But the element of wealth in this assembly, which is exhibited by the division into classes, soon gained a political significance. The voting power of the classes differed considerably. That of the wealthy was greater than that of the middle-class, and that of the middle-class far in excess of that of the poor. Thus the Comitia Centuriata was always assumed to have something of an aristocratic character; and the change which its constitution underwent during the Republic was at least partly directed by an effort to modify this character. The scheme recognized five classes, the census of each being (in terms of the later assessment of the historical period) respectively 100,000, 75,000, 50,000, 25,000, and 11,000 (or 12,500) asses. The first class contained eighty centuries, the second, third, and fourth, twenty each; the fifth, thirty. Thus the centuries of the first-class were almost equal to those of the four other classes put together. The weight of aristocratic influence may be still more fully realized if we remember that the corps of Roman Knights (centuriae equitum equo publico) formed eighteen centuries in this assembly, and that the mass of citizens whose property fell below the minimum census were grouped in a single century. The collective vote of the first class and the knights was represented by ninety-eight centuries; the collective vote of the whole of the rest of the community (including four or five centuries of certain professional corporations connected with the army, such as the Fabri) was

represented by ninety-five or ninety-six centuries [1]. Thus the upper classes in the community possessed more than half the votes in this assembly.

A modification in the structure of the Comitia Centuriata was subsequently effected, which had the result of giving a more equal distribution of votes. No precise date can be assigned for the change; but it has been thought not to be earlier than 241 B.C., the year in which the number of the tribes was raised to thirty-five [2]. The principle of the new arrangement was that the tribe was made the basis of the voting power of the classes. There is considerable divergence of opinion as to the method in which the centuries were distributed over the tribes; but, according to the more usually accepted view which has been held by scholars from the seventeenth century onwards [3], the five classes were distributed over all the tribes in such a manner that there were two centuries of each class—one century of *seniores* and one of *juniores*—in a single tribe. Each class would thus have two votes in each tribe and seventy votes in all. The total number of centuries belonging to the five classes would be 350, of which the first class would possess but seventy

[1] The scheme was as follows:—

THE CAVALRY.

18 centuries, chosen from the richer classes (Dionys. iv. 18), but probably with no fixed property qualification.

THE INFANTRY.

1st classis—100,000 asses (Liv. i. 43, Dionys. iv. 16, Polyb. vi. 23); 120,000 asses (Plin. *H. N.* xxxiii. 3, Festus, p. 113).
Seniores, 40 centuries }
Juniores, 40 centuries } 80

2nd classis—75,000 asses (Livy and Dionysius).
Seniores, 10 centuries }
Juniores, 10 centuries } 20

3rd classis—50,000 asses (Livy and Dionysius).
Seniores, 10 centuries }
Juniores, 10 centuries } 20

4th classis—25,000 asses (Livy and Dionysius).
Seniores, 10 centuries }
Juniores, 10 centuries } 20

5th classis—11,000 asses (Livy); 12,500 (12½ minae, Dionysius).
Seniores, 15 centuries }
Juniores, 15 centuries } 30

Fabri—2 centuries (voting with the 1st class, Livy; with the 2nd class, Dionysius).
Accensi, *cornicines*, *tibicines*, 3 centuries, Livy; 2 centuries, Dionysius (voting with the 4th class, Dionysius).
} 5 centuries (Livy). 4 centuries (Dionysius).

Capite censi or *Proletarii*, 1 century (Livy). 1 century.

Total 193 or 194 centuries.

[2] Cf. Liv. i. 43. He describes the new organization as existing 'post expletas quinque et triginta tribus.' Yet he does not say that it began its existence at that date. Mommsen (*Staatsrecht*, iii, p. 270) conjecturally assigns the change to the censorship of C. Flaminius (220 B.C.).

[3] This system was first suggested by Pantagathus, who died in 1657.

votes; or, if we add the other centuries of knights (18), of corporate bodies such as the Fabri (4), and of Proletarii (1), we find that the first class and the knights commanded but eighty-eight votes out of a total of 373[1]. This system, which lessened the influence of the wealthier classes, was temporarily abolished by Sulla in 88 B.C.[2]; but it was soon restored, and there is every reason to suppose that it survived the Republic and formed the basis of the arrangement of the Comitia Centuriata under the Principate[3]. Although the Comitia was organized on this tribal basis for the distribution of voting power, the voting unit was still the century and not the tribe. The seventy centuries of each class voted in turn; the decision of each century was determined by the majority of the votes of its individual members; and the majority of the centuries determined the decision of the assembly.

The Comitia Centuriata, although of the utmost importance in the structure of the Roman Constitution as the body that elected the magistrates with Imperium and the censors, that exercised capital jurisdiction and declared war, ceased to be employed in the period of the developed Republic as an ordinary legislative assembly. It was difficult to summon and unwieldy in its structure, and its position as a legislative body came to be usurped by the two assemblies of the tribes. Yet, as we shall see[4], it may have been held that legislative acts, which affected the fundamental principles of the Constitution, should be submitted to the centuries.

The Comitia Tributa Populi had probably been instituted in imitation of the Plebeian Assembly of the Tribes. It was found convenient that the Populus should meet in this way as well as the Plebs; and the Tribus—the voting unit which had already been employed for assemblies of the Plebs—was used for assemblies of the whole people. The Tribus was always a division of the territory of the Roman State in Italy, and the tribes grew in number as this territory increased until by the year 241 B.C. they had reached their final total of thirty-five. It is generally believed that originally only holders of land were registered as members of a tribe[5]; but there is

[1] Mommsen's system (*Staatsr.* iii, p. 275) is different, and is based on the view that the description given by Cicero (*de Rep.* ii. 22. 39, 40) refers, not to the older arrangement, but to the reformed Comitia. Mommsen allows the 70 votes for the 70 centuries of the first class, but thinks that the 280 centuries of the other classes were combined so as to form only 100 votes. The total votes in the Comitia would thus be 70 + 100 + 5 (Fabri, &c.) + 18 (Knights); i.e. 193 in all, as in the earlier arrangement.

[2] App. *Bell. Civ.* i. 59.

[3] This Comitia seems still to have met for formal business as late as the third century A.D. At least Dio Cassius (Consul 219 or 220 A.D.) describes the flying of the flag from the Janiculum as a custom still surviving in his day (xxxvii. 28).

[4] P. xxix.

[5] This was the view taken by Mommsen (*Staatsr.* iii, pp. 182, 184). He held

no sufficient evidence for this view, and it seems safer to conclude that, while every holder of land was registered in the tribe in which his allotment lay, every landless man was registered in the tribe in which he had his domicile. At a later period registration became more arbitrary, and had little or nothing to do with the residence of the person registered. The censor enrolled individuals in tribes at his pleasure; usually he entered a man in the tribe to which his father had belonged; but he might, if he willed, transfer him from one tribe to another (*tribu movere*).

In an assembly organized by tribes (*tributim*) the vote of the majority of the members of a particular tribe determined the decision of that tribe, and the vote of a majority of the tribes the decision of the assembly. The Comitia Tributa Populi must have been instituted later than 471 B.C., which is the traditional date at which the Plebs began to meet by tribes [1]; and it may have been in existence some twenty years later, at the date of the formation of the Twelve Tables [2]. The first evidence for it as a legislative assembly belongs to the year 357 B.C. [3]. In the later Republican period it was probably quite the most active of the legislative assemblies of the whole people.

The Comitia Curiata, the oldest of all the Roman assemblies, whose structure was based on the ancient Curiae or Parishes of Rome, ceased in the historical period to be a true legislative assembly. It met only for the performance of certain formal acts, such as the *lex curiata* which ratified the Imperium of the higher and the Potestas of the lower magistrates [4]. For this purpose the thirty Curiae were in Cicero's day often represented by but thirty lictors [5]. The assembly may have been as scantily attended when it performed the formal acts vested in it when it met as the Comitia Calata [6]. In this

(ii, p. 403) that Appius Claudius, the censor of 312 B.C., first included the landless citizens in the tribes (cf. Girard, *Manuel*, p. 31); but our authorities (Diod. xx. 46, Liv. ix. 46) only represent Appius Claudius as allowing citizens to be registered where they pleased, and as spreading the lower classes (*humiles*) over all the tribes. The definition which we possess of the Comitia Tributa (Laelius Felix ap. Gell. xv. 27) speaks of it only as an assembly at which the votes are given 'ex regionibus et locis.'

[1] Liv. ii. 56. Previously it had probably met by Curiae. Hence the tradition that the early tribunes were elected in the Comitia Curiata (Liv. *l. c.*, Cic. ap. Ascon. *in Cornelian.* p. 76).

[2] When the Tables enacted 'De capite civis nisi per maximum comitiatum . . . ne ferunto' (Cic. *de Leg.* iii. 4. 11), this mention of the 'greatest Comitia' (i.e. the Comitia Centuriata) seems to imply the existence of a lesser Comitia with judicial powers; and the latter could scarcely have been the Comitia Curiata of the period.

[3] Liv. vii. 16.

[4] For the application of the *lex curiata* to the minor magistracies, as well as to those with Imperium, see Messala ap. Gell. xiii. 15. 4 'Minoribus creatis magistratibus tributis comitiis magistratus, sed justus curiata datur lege.'

[5] Cic. *de Leg. Agr.* ii. 12. 31.

[6] Gaius, ii. 101; Gell. xv. 27.

capacity it was gathered under the presidency of the Pontifex Maximus for the inauguration of the Rex Sacrorum and the Flamines, and for the Detestatio Sacrorum—the renunciation of pre-existing religious obligations which was made by a man who passed from his Gens, either by an act of Adrogatio or by transition from the patrician to the plebeian order[1].

The assembly of the Plebs[2] excluded the patrician members of the community, and continued to be organized by tribes. Its true designation was Concilium Plebis, Concilium differing from Comitia as a gathering of a part of the people differs from a gathering of the whole[3]. This assembly is often spoken of by ancient writers as the Comitia Tributa; but it differed from the Comitia Tributa Populi in two respects. It did not include Patricians, and it was presided over, not by a magistrate of the People, but by a magistrate of the Plebs. When it met for legislative purposes, it was presided over only by the Tribune of the Plebs. The legislative authority of the Concilium Plebis had developed steadily during the first two centuries of the Republic. At first this assembly could only pass ordinances binding on the members of the Plebs themselves. Then, by the Valerio-Horatian and Publilian laws (449 and 339 B.C.) it gained the right of considering and initiating proposals which affected the interests of the whole community; this right being probably acquired and exercised by the creation of increasing facilities for bringing resolutions of the Plebs as petitions to the assemblies of the people, to be confirmed or rejected by the latter[4]. Since the Plebs came gradually to constitute the majority of voters in the assemblies of the people, these petitions must as time went on have been almost invariably confirmed. The distinction between Plebiscita and Leges must have been growing more and more formal and unreal when the Lex Hortensia (287 B.C.) enacted that henceforth Plebiscita should have the force of Leges[5]. From this time onwards there was no difference between the Populus and the Plebs in matters of legislation, except that it may have been held by some thinkers that fundamental changes in the Constitution, such as those introduced by Sulla, ought

[1] Gell. *l. c.*

[2] P. xxi.

[3] Laelius Felix ap. Gell. xv. 27 'Is qui non [ut] universum populum, sed partem aliquam adesse jubet, non "comitia," sed "concilium" edicere debet.' See Mommsen, *Staatsr.* iii, p. 149.

[4] Strachan-Davidson, starting from the view that Plebiscita were originally sent as petitions to the consuls and senate (cf. Dionys. x. 31), suggests that the Valerio Horatian law may have 'laid down that the consul must so consult the senate, or it may even have forbidden him arbitrarily to disregard a recommendation of the senate (should such be obtained) that he should put the question to the populus'; and that the Publilian law 'may have struck out the intervening consultation of the senate, and may have required the consul to bring the petition of the plebs at once before the populus' (Smith, *Dict. of Antiq.* ii, p. 439).

[5] Gaius, i. 3; Pompon. in Dig. 1. 2. 2. 8.

to be ratified by the Comitia Centuriata[1]. But in nearly all the spheres subject to the commands of the people, the Populus and the Plebs were equally competent; a Lex could repeal a Plebiscitum and a Plebiscitum a Lex[2]. This dual sovereignty, which is one of the most curious of the theoretical features of the Roman Constitution, was rendered possible and harmless by the fact that the mass of the voters in all the different assemblies were composed of the same individuals, and by the central control exercised by the Senate over all magistrates, and therefore over all assemblies before which these magistrates introduced their proposals. The initiation of legislation was, in fact, during the days of Republican stability, in the hands of the Senate; but, apart from the exercise of this authority, which had long had a *de facto* recognition, but was not recognized by law until the time of Sulla (88 and 81 B.C.)[3], the Senate did not pretend to exercise legislative power during the Republic. In its own right it could only exercise certain powers approximating to those of legislation. We find it, for instance, fixing the rate of interest[4]; but such an ordinance technically assumed the form merely of advice to the judicial magistrates as to the rates which they should recognize in their edicts. The Senate, however, exercised the power of dispensing individuals from the existing laws[5]; and we find it also warning the community that some enactment which had passed the people was, on technical grounds, invalid, and was therefore not binding either on the magistrates or on any member of the State[6].

In few societies of the ancient world was the legislative power so unfettered as it was at Rome. The Romans drew no distinction between constitutional law and other laws; the Roman assemblies could create new assemblies, could alter their own structure, could modify or even suspend the Constitution by granting enormous powers to individuals. There was no sphere of human interest outside their control; their power of utterance was limited only by a respect for religious law[7]. We might, therefore, have expected that legislation would have been the chief path on which Roman law advanced to its maturity. But this expectation is disappointed, so far as the progress of the Jus Privatum is concerned. We do indeed find a certain number of statutes which deal with important matters of private law, such as the Lex Aquilia de Damno, the Lex

[1] We know, at least, that some of Sulla's legislation was effected through the Comitia Centuriata (Cic. *pro Dom.* 30. 79).

[2] Thus, Cicero was exiled by a Plebiscitum, but restored by a Lex Centuriata.

[3] App. *Bell. Civ.* i. 59.

[4] Cic. *ad Att.* v. 21. 13.

[5] Ascon. *in Cornelian.* p. 58.

[6] Cic. *pro Domo*, 16. 41; Ascon. *in Cornelian.* p. 68.

[7] Hence the saving clause in enactments, 'Si quid sacri sancti est quod non jure sit rogatum, ejus hac lege nihil rogatur' (Probus). Cf. Cic. *pro Caec.* 33. 95.

Furia on testaments, the Lex Voconia on inheritances; and it is also true that certain important changes in civil procedure were sanctioned by the people, the most far-reaching of these changes being perhaps that effected by the Lex Aebutia, which helped to replace the Legis Actio by the Formula [1]. But the legislation referring to private law and civil procedure at Rome is in no way comparable in bulk to that which dealt with criminal and constitutional law. Even those Leges or Plebiscita that dealt with civil procedure, perhaps did little more than ratify a change that had been already accomplished in the courts, or carry this change a few steps further. And, as to the alterations in the material elements of private law, these alterations were determined to a far greater extent by interpretation than by legislation.

§ 11. *Law as the result of Interpretation.—Interpretation by the Magistrate.*

Interpretation at Rome assumed two forms. It was either the work of the magistrate or the work of the jurisconsult. The magistrate chiefly concerned with the interpretation of private law was the Praetor. The office of Praetor is said to have originated as a result of the Licinian laws of 367 B.C. [2] This new magistrate was created for the purpose of performing most of the judicial business of the Consuls, who, on account of the increasing complexity of political life, were found incapable of conducting the whole of the home and foreign affairs of Rome. For more than 120 years this single magistrate administered civil justice to citizens and aliens. At the close of this period (242 B.C.) a second Praetor was appointed[3] whose duty it was to decide cases between aliens (Peregrini) and between citizens and aliens. The former (Praetor qui inter cives jus dicit) was known by the colloquial name of Praetor Urbanus; the latter (Praetor qui inter peregrinos jus dicit) was known by the similarly abbreviated title of Praetor Peregrinus.

Every magistrate at Rome was in the habit of notifying to the public the manner in which he meant to exercise his authority, or any change which he comtemplated in existing regulations, by means of a public notice (Edictum). In the case of magistrates who were merely concerned with administrative work, such notices were often occasional (edicta repentina); in the case of magistrates concerned with judicial business, they were of necessity valid for the whole period during which the magistrates held their office, and capable of

[1] P. xl.   [2] Liv. vi. 42.

[3] Liv. *Ep.* 19. The date is not quite certain. Lydus (*de Mag.* i. 38) places the event in 247 B.C. See Mommsen, *Staatsr.* ii, p. 196.

transmission to their successors (perpetua et tralaticia); for jurisdiction does not admit of occasional and isolated ordinances which have only a temporary validity. The edicts of the Praetors were necessarily of this latter type. Each new occupant of the office might admit rulings not recognized by his predecessors; these rulings were forced on him by the fact that new and unexpected combinations in legal relations had been presented to his notice, or that the existing rules did not answer to a growing sense of equity. New rulings cannot be introduced into a system of law without affecting old ones. The fact that there was an edict gave the Praetor a chance of smoothing out anomalies, instead of exhibiting inconsistencies, in the law. The edict admitted of change and development; but it was a change that was subtle and gradual, not violent and rapid. The process by which it was reached professed to be a process of interpretation. It was really creative work of a highly original kind.

The Edictum of the Praetor [1], in the sense in which this word is commonly used, is really a colloquial expression for the Album, or great notice-board exhibited by the Praetor, which contained other elements besides the Edicta in their true and proper sense. It contained the Legis Actiones and the Formulae of the Civil Law (Jus Civile) [2], probably preceded by certain explanatory headings, but by no edict; for the Praetor did not create the rulings on which these civil actions and formulae were based. But it contained as well the Formulae which were the creation of him and his predecessors—the Formulae which were the product of what was known as 'Magistrate's Law' (Jus Honorarium); and each of these Formulae was no doubt preceded, at least eventually, by the Edictum or ruling in law, which might have grown out of the Formula, but finally served as its basis and justification. Thus the edictal part of the Album was really a series of separate Edicta, each edict being followed by its Formula; it was regarded as being a supplement to that portion which specified the Actions of Civil Law; and it really had this character of being a mere supplement in so far as 'honorary' actions were seldom granted where a 'civil' action would have sufficed. But its supplementary character was of a very far-reaching kind. Thus the edicts might take cognizance of cases not provided for by the civil law at all, they might replace the mechanism provided by the civil law for attaining a legal end, and they might alter the character of the end itself. All these functions are summed up by Papinian when he says that the work of the Jus Praetorium was 'to assist, to supplement, to correct the civil law for the sake of

[1] See Wlassak, *Edict und Klageform*.

[2] P. xl.

public utility[1].' The edict of the Praetor Peregrinus was necessarily still more of a substitute for the civil law than that of the Praetor Urbanus. For, since the Legis Actiones could not (at least in many cases) be employed by Peregrini[2], he was forced to invent equivalents for these forms of action.

The third Edictum Perpetuum which was valid in Rome was that of the Curule Aediles[3]. It was of no great content, since it was concerned exclusively with the jurisdiction over the market, and the control of public sites—a jurisdiction and control which were possessed by these magistrates. For an edict in any way comparable to those of the Praetors we must turn to the provinces. Here the governors (whether Proconsuls or Propraetors) issued notices of their intentions with respect to jurisdiction, similar to those of the Praetors at Rome as regards their permanent character and the possibility of their transmission, but peculiarly applicable to the particular governor's special sphere of administration. A special edict was issued for each separate province (thus we read of an Edictum Siciliense)[4]; but this special character did not prevent certain inter-relations between the edicts of separate provinces. We know that the Provincial Edict might be prepared at Rome, before the governor went to his province[5]; and although the man who prepared it (of course, with the assistance of professional lawyers), tried to model his rules as closely as possible on those of his predecessor in the province to which he was going, yet he might borrow improvements which had been initiated by the late governor of some other province. Again, the same man might pass from one province to another, and, much as the circumstances of the separate spheres of government differed from one another, it is inconceivable that he should not have carried some of his favourite rules of procedure with him. A general conception of what a Provincial Edict should be like, must have grown up; the differences between the edicts being probably those of matter rather than of form—the matter being determined by the local customary law of the subject peoples, which Rome rigidly respected. Where there were striking differences of form, these must have been mainly due to the varieties of rights granted by the Charters of the different provinces (Leges Provinciarum). It is obvious that, where much was granted by Charter, little was left to the discretion of the governor. Where the Charter granted only a few elementary rights, he had a much freer hand.

[1] 'Adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam' (Papin. in Dig. 1. 1. 7. 1).

[2] It has sometimes been thought that Peregrini were wholly excluded from the use of the Legis Actio. See Girard, *Manuel*, p. 110.

[3] Dig. 21. 1; Cic. *de Off.* iii. 17. 71; Gell. iv. 2.

[4] Cic. *in Verr.* i. 45. 117.

[5] Cic. *ad Fam.* iii. 8. 4.

One important point in which the governor of a province differed from a Praetor at Rome, was that he was an administrative as well as a judicial official. Hence the Provincial Edict had to contain a good many rules of administrative law which were not to be found in its counterpart at Rome. This portion of the edict spoke about the financial relations of the states of the province to the Roman government and to its agents, and stated the rules which regulated the relations of the tax-gatherers (Publicani) to the tax-payers. The rest of the edict which took a definite shape, covered the procedure which the governor promised to apply for the recovery of certain rights by individuals—rights such as those entailed in inheritance or the seizure of a debtor's goods. These rules were based on those of Roman law; but they were mere outlines capable of adaptation to the local customs of the subject states. But there was, at least in certain provinces, a portion of the edict, still dealing with the rights of individuals, which assumed no definite shape. There were points on which the governor did not care to frame rules until he knew the emergencies which he would have to meet. He was content (at least Cicero was, when governor of Cilicia) with promising that, in issuing decrees on such points, he would conform to the principles of the urban edicts [1].

§ 12. *The debts which this development of law owed to the Italian and provincial world.*

If we ask what was the great motive power which lay behind this development of law through interpretation by the magistrate, we shall find it to consist, partly in contact with foreign peoples; partly (although probably in a less degree) in the new educational influences which were moulding the lives of the Roman nobles. The tendency to experiment and adaptation, to a disbelief in anything fixed and rigid, is thoroughly Roman; but external circumstances were very largely responsible for the particular lines on which this tendency was to move. The legal consequence of contact with foreign races is summed up in the phrase Jus Gentium. The word 'Gentes' in this collocation means 'the world [2]'; and it is possible that, when the expression Jus Gentium was first formed,

[1] Cicero thus sketches the contents of the whole edict which he published as governor of Cilicia (*ad Att.* vi. 1. 15) :—'Unum (genus) est provinciale, in quo est de rationibus civitatum, de aere alieno, de usura, de syngraphis ; in eodem omnia de publicanis. Alterum, quod sine edicto satis commode transigi non potest, de hereditatum possessionibus, de bonis possidendis vendendis, magistris faciendis : quae ex edicto et postulari et fieri solent. Tertium, de reliquo jure dicundo ἄγραφον reliqui. Dixi me de eo genere mea decreta ad edicta urbana accommodaturum.'

[2] Clark, *Practical Jurisprudence*, p. 354. On the content of the Jus Gentium see Nettleship, *Contributions to Latin Lexicography*, p. 503 ; Mommsen, *Staatsr.* iii, p. 604.

Rome regarded herself as rather outside this world whose customs she was contemplating, although even her earliest practice showed an inner conviction that she was a very integral part of it indeed. The moment that she began to trade with the foreigner, whether in Italy, Sicily, or Africa, she must have seen that her own Jus Civile was an impossible basis for trading relations. If the Roman had no liking to submit to the intricacies of the law of some other state, the foreign trader had equally little inclination to conform to the tedious formalities of Roman law. Some common ground had to be discovered as the basis for a common court, which might adjudicate on the claims of Private International Law. This common ground was found in the Jus Gentium; the common court was that of the Recuperatores of early times[1]. The history of the Praetorship leads us to think that the Jus Gentium must have begun to exercise a modifying influence on Roman law long before the middle of the third century B. C.; for we have seen that for more than 120 years a single Praetor administered justice both to Cives and Peregrini[2]. A single magistrate therefore published and dealt with two distinct systems of law. But it would seem to be impossible that he could have kept the two absolutely distinct, especially when the simplicity and universality of the Jus Gentium stood in marked contrast to the complexity and singularity of the Jus Civile. The rigidity of the forms of Roman law may have been shaken even at this early period. But when a second Praetor was appointed to frame a special edict for Peregrini, the Jus Gentium must have found a still more complete and systematic expression. The procedure by which the legal claims of aliens were asserted must have been more fully elaborated. This was the procedure by Formula, which was to furnish the prototype for the method adopted by the Praetor Urbanus, and to replace the older procedure by Legis Actio in most of the Roman courts of law. Nor can we ignore the influence of the Edictum Provinciale, although this came later and at a time when the typical elements in Roman procedure had been fixed. Rome gained some ideas from the Hellenised East, as in early days she had gained some from Magna Graecia. It was probably from contact with the East that she gained the knowledge of such simple forms of written agreement as Syngrapha and Chirographa, and that she acquired her theory of Mortgage (Hypotheca).

[1] *Festus, p. 274*: 'Reciperatio est, ut ait Gallus Aelius, cum inter populum et reges nationesque et civitates peregrinas lex convenit quomodo per reciperatores reddantur res reciperenturque, resque privatas inter se persequantur.'

[2] *P. xxxi.*

§ 13. *The idea of the Law of Nature; its influence on Slavery.*

The Jus Gentium could not pass from being a mere fact to being an ideal without gaining some theoretical justification for its existence and acceptance. This justification was found in the idea that it was a product of the Law of Nature. It is not improbable that the superior 'naturalness' of the Jus Gentium to the Jus Civile had begun to appeal to the Romans long before they had begun to be affected by Greek philosophic thought; for we know the effect which was produced on the minds of the Greeks themselves by their early contact with foreign civilizations. They rapidly drew the conclusion that what was common to various countries existed by nature (φύσει), what was peculiar to a country existed by convention (νόμῳ); and the κοινὸς νόμος [1] or τὸ φυσικὸν δίκαιον [2] of the Greeks is practically identical with the Jus Gentium of the Romans. Even to the primitive mind the universality of an institution implies its naturalness. But it is very probable that the Stoic conception of Nature did, to the Roman mind, complete the train of thought and give a scientific stability to a vague impression. It was not, indeed, possible to identify the Jus Gentium with the Lex Naturae; for a Jus cannot be the same as a Lex. But it might be regarded as the product of that Lex, as its concrete expression in human society. The immediate product, however, of the Lex Naturae is the Jus Naturale. The Jus Gentium tended, therefore, to be identified with the Jus Naturale; and the identification seems to be complete except in one important point. According to the view finally adopted by the jurists, the Jus Naturale implies personal freedom; for all men are born free in a state of nature [3]. But the Jus Gentium (the law of the civilized world) admits the institution of Slavery. In this point, therefore, the two are in conflict, and the Jus Naturale presents an even higher ideal of society than the Jus Gentium. The relation between the three types of Jus, known to the theory of Roman jurisprudence, may be expressed by saying that the Jus Civile is the Right of man as a member of a state, the Jus Gentium the Right of the free man, the Jus Naturale the Right of man [4].

The appeal to Nature on behalf of the slave is an index of the part which he was to play in the development of Roman law. Roman slavery cannot be judged solely either by the dismal picture

[1] Arist. *Rhet.* i. 13. [2] Arist. *Eth.* v. 7.

[3] 'Cum jure naturali omnes liberi nascerentur' (Ulpian in Dig. 1. 1. 4).

[4] See Muirhead, *Historical Introduction to the Private Law of Rome*, p. 281: 'While the *jus civile* studied the interests only of citizens, and the *jus gentium* those of freemen irrespective of nationality, the law of nature had theoretically a wider range and took all mankind within its purview.' Compare Carlyle, *Mediaeval Political Theory in the West*, ch. 8 ('The Theory of the Law of Nature').

presented by the plantation system, or by the legal theory that the slave was a mere Thing (Res), a chattel, not a person. We must remember that the slave, often of an intelligence and culture superior to those of his master, and gifted with the practical genius and the capacity for detail characteristic of the Greek, was frequently an active man of business. We must remember too that the very fact that he was a chattel might be employed by the law as the basis for the theory that he was, for this very reason, an excellent Instrument of Acquisition. So essential was he to his master in his capacity of agent that the law was forced to recognize that he could be a party to an obligation. The obligation, it is true, could not be called legal; it was only natural (Naturalis obligatio)[1]; but still it was an obligation that could benefit the master, without making that master's condition worse[2]. It was necessary, however, to protect other parties to these contracts; and the Praetor gradually created a series of quasi-liabilities for the master of the trading slave. Such liabilities are expressed in the actions Quod Jussu, Tributoria, De Peculio, De in Rem Verso[3]. They were created in the interest of the master as well as in that of the other party to the contract; for without these guarantees slave-agency would have become impossible. In the history of agency the slave plays a distinguished part; and the part that he plays is formally justified by the view that he is the possessor of Natural Rights.

§ 14. *Interpretation by the jurisconsults.*

All these new influences on Roman law, although they found their most marked expression in the edicts of the magistrates, were also absorbed by that Professional Jurisprudence which gives us the other aspect of the science of Interpretation. It may have been the more important aspect; for the teaching of the schools, and the advice of jurisconsults, no doubt did much to stimulate and guide the activity of the magistrates. We are told that the influence of skilled lawyers was for a very long time represented by the College of Pontifices. Even after the publication of the Twelve Tables and the revelation of the forms of Action (448, 304 B.C.), and during the period when secular was becoming more and more divorced from religious law, the knowledge of jurisprudence was, in virtue chiefly of the familiar fact that professions once associated are not easily separated, exhibited mainly in the person of the Pontifex Maximus;

[1] Ulpian in Dig. 44. 7. 14: 'Servi . . . ex contractibus . . . civiliter . . . non obligantur; sed naturaliter et obligantur et obligant.'
[2] 'Melior condicio nostra per servos fieri potest, deterior fieri non potest' (Gaius in Dig. 50. 17. 133).
[3] Gaius, iv. 69–74; Justin. *Inst.* iv. 7.

and the men who held this office still furnished for centuries the leading names to Roman jurisprudence. At first the science was imparted with an air of mystery; the advice was occasional and elicited only by special request. But finally the profession of law on the part of the Pontiffs became more open and more systematic. The first of these who taught the science publicly is said to have been Tiberius Coruncanius [1] (*circa* 280 B.C.), who was also the first plebeian Pontifex Maximus. Lastly, the stage of written commentaries was reached. These commentaries were stimulated by the increasing difficulty of interpreting the language and meaning of the Twelve Tables. The earliest commentator on this code who is known to us, was Sextus Aelius Paetus, consul in 198 and censor in 193 B.C. He busied himself with the interpretation of the legal difficulties connected with the Tables, and published a work called *Tripertita*, which gave in three divisions the text of the Tables, an explanation of each ordinance, and the form of action applicable to the cases which these ordinances raised [2]. His later contemporary, Acilius, seems also to have been a legal commentator [3]. An explanation of the obsolete language of the Tables was, so far as we know, first attempted by the great philologist Lucius Aelius Stilo Praeconinus, who was born about 154 B.C. [4] One of the results of the work of these commentators was that the text of the Tables, as it appeared in their editions, became the recognized, and in fact the only, text for all subsequent ages; for it seems quite clear that the later commentators, as for instance Gaius, had no knowledge of any antique copy of the Tables, engraved on metal and posted up in some public place [5]. But there was another reason why a knowledge of the Tables, in their original form, was becoming decadent even during the period of the later Republic. The Praetor's Edict, as a living source of law, was superseding the ancient Code. Juristic investigation was grappling with present problems and did not care to concern itself with the antique. The Tables had been explained; now they were to be expanded. But the expansion came with the edict, and with the creative jurisprudence which was a product of the new Greek culture and the extension of the Roman Empire. The founders of this scientific jurisprudence, whose labours were to be perpetuated by the lawyers of the Principate, were Marcus Junius Brutus, Marcus [6] Manilius and Publius Mucius Scaevola, all of whom

[1] Pompon. in Dig. 1. 2. 2. 38.

[2] Pompon. *l. c.*; cf. Cic. *de Leg.* ii. 23. 59; *de Or.* i. 56. 240; *Brut.* 20. 78; *de Rep.* i. 18. 30.

[3] Cic. *de Leg.* ii. 23. 59; *de Amic.* 2. 6. He is called Atilius by Pomponius (*l. c.*). See Schöll, *Legis duodecim tabularum reliquiae*, p. 25.

[4] Teuffel-Schwabe, *Geschichte der römischen Litteratur*, § 125; Schöll, *op. cit.* p. 26.

[5] Schöll, *op. cit.* pp. 11, 15.

[6] Sometimes written 'Manius.'

flourished about the middle of the second century B.C. They were followed by a long line of distinguished successors to the close of the Republic[1]. The study of law was becoming professional, but it was not confined to a body of men who made jurisprudence the sole business of their lives[2]. The knowledge and exposition of law was an incident in the career of some of the greatest statesmen of the day. It may have been their ruling, but it was by no means their sole interest; and sometimes the fruitful experience of a lifetime spent in an active forensic and political career was given to admiring students during the repose which marked the closing years of the statesman's life[3]. The rewards of the profession were purely honorary; the only payment was repute, gratitude, or political support; and the practical utility of the jurists was as much valued as their theoretical knowledge. They pleaded or gave advice to pleaders; they gave a scientific precision to the formulae of legal business; and they returned replies (*responsa*) to the questions of litigants, magistrates, or judices on legal points which arose whether before or in the course of the hearing of a case[4]. It was through these replies, which were given sometimes in private, sometimes in the Forum[5], that the jurisconsults became great oral and literary teachers. The replies were sometimes given in writing[6]; but, even when verbal, were often collected into books; and the audience which received them was by no means confined to those who were primarily interested in the answers. The young were admitted to the consultations[7], and the consultation often closed with a disputation[8]. This practice led eventually to systematic teaching; disciples attached themselves to a particular exponent of law, who gave some a preliminary training and directed others in a course of study that was more advanced[9]. In no respect was this system of education regulated by the State. No teacher was more authentic than another.

[1] See Roby, *Introduction to the Study of Justinian's Digest*, pp. 95–124.

[2] On the characteristics of the study of law during this period see Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts*, pp. 48 foll.

[3] Cic. *de Or.* i. 45. 199–200, 'Quid est enim praeclarius, quam honoribus et rei publicae muneribus perfunctum senem posse suo jure dicere idem, quod apud Ennium dicat ille Pythius Apollo, se esse eum, unde sibi, si non populi et reges, at omnes sui cives consilium expetant . . . Est enim sine dubio domus jurisconsulti totius oraculum civitatis.'

[4] These three functions are summed up by Cicero in the words *agere, cavere, respondere*. See Cic. *de Or.* i. 48. 212: 'Sin autem quaereretur, quisnam jurisconsultus vere nominaretur, eum dicerem, qui legum et consuetudinis ejus, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset.' *Cf.* Krüger, *op. cit.* p. 49.

[5] Cic. *de Or.* iii. 33. 133.

[6] Cic. *pro Mur.* 9. 19. Cicero here describes the 'urbanam militiam respondendi, scribendi, cavendi.' The interpretation that I have given to *scribere* is that of Krüger, *op. cit.* p. 50. Cf. Cic. *Top.* i. 1. 4.

[7] Cic. *Orator*, 41. 142, 42. 143.

[8] Cic. *Top.* 14. 56.

[9] Krüger, *op. cit.* p. 51.

Controversy grew and flourished[1]. The only proof of the validity of an opinion was its acceptance by a court. But even this was but a slender proof; for different Praetors or Judices might be under the sway of different jurists. It required a single superior court and a single controlling authority (both of which were found in the Principate) to guide the stream of legal opinion into narrower and more certain channels.

Amidst this stream of interpretation we discern one attempt to give a fixity to at least a part of Roman law. Ofilius, a Roman knight of the period of Cicero and Caesar, was the first to reduce the Praetor's Edict to some kind of system[2]. It is probable that a still greater work of revision was at one time projected for this jurist; for we are told that Caesar, amidst his ambitious schemes for the regeneration of the Roman world, conceived the idea of making a digest of the Roman law[3]. Had he lived to carry out this scheme, it is probable that Ofilius would have been entrusted with the work.

§ 15. *Reforms in Procedure effected during the later period of the Republic.*

The progress effected during this period in the theory of law was accompanied by a great reform in procedure. From about 150 B.C. the process both of the civil and criminal courts began to assume a form which was final for the period of the Republic, and which was supplemented, but not altered, during the greater part of the period of the Principate[4]. In the domain of Civil Procedure, a Lex Aebutia gave some kind of formal sanction to the practice by which the Praetor tended to substitute the simpler Formula for the more complex Legis Actio[5]. The Formula had perhaps first been employed in the statement of cases for Peregrini. Its utility commended its use for cases in which Roman citizens alone were involved. The Praetor Urbanus employed it for his honorary jurisdiction; it was then transferred (doubtless by the Lex Aebutia) to the civil law as an alternative, in most cases, to the Legis Actio. We cannot say in

[1] Cic. *de Or.* i. 38. 173; 57. 241, 242; *pro Mur.* 12. 27; 13. 28.

[2] Pompon in Dig. 1. 2. 2. 44: 'De iurisdictione idem (Ofilius) edictum praetoris primus diligenter composuit.'

[3] Suet. *Jul.* 44. Ofilius' intimacy with Caesar is noticed by Pomponius (Dig. *l. c.*).

[4] The civil procedure of the *judicia ordinaria* survived the Principate. When the criminal procedure of the *quaestiones perpetuae* disappeared is unknown. Their disappearance has been placed as early as the close of the first century A.D. (Geib, *Criminalprocess*, pp. 392–397). But it has been thought that Dio Cassius (lii. 20, 21) implies their existence in his own time, at the beginning of the third century A.D.

[5] Gaius, iv. 30; Gell. xvi. 10. 8. The date of the law is unknown, but is not likely to be earlier than 150 B.C. Girard (*Manuel*, p. 987) finds indications for placing it between 149 and 126 B.C.

what form the alternative was presented. We know that the law must have exempted certain kinds of jurisdiction from the Formula—the jurisdiction, for instance, of the Centumviral and Decemviral courts. But it may have allowed the Praetor to substitute the one procedure for the other in most spheres of civil jurisdiction; and, where the Praetor still permitted the Legis Actio and the Formula to stand side by side in his Album, it may have given the litigants a choice between the two. The two methods of procedure still exist side by side in Cicero's time; but the formulary procedure is demonstrably the more general of the two.

About the time when this reform was being effected, an attempt was made to create a method of criminal procedure, simpler and more effective than that of a trial before the People. The type on which the new criminal courts were constituted was furnished in the main by Civil Procedure. Cases of extortion (Repetundarum), in which compensation was demanded for a delict, were first tried before a Praetor and Recuperatores. This was a mere provisional arrangement initiated by the Senate for the benefit of the provincials[1]. But the system, or one closely modelled on it, was perpetuated by the Lex Calpurnia Repetundarum of 149 B.C.[2], and gradually these recuperatorial boards grew into great panels of Judices, the qualifications for the jurors being specified by judiciary laws (Leges Judiciariae). Finally, almost the whole sphere of the criminal law was embraced by a series of enactments which created standing courts (Quaestiones Perpetuae, or Judicia Publica), each for the trial of a special offence or a group of related crimes. All of these courts followed the same model. In each a President (Quaesitor), who was generally a Praetor, sat with a bench of Judices who pronounced a penalty fixed by the law which had constituted the court. From the judgment of these Judices there was no appeal to the People.

§ 16. *The Creation of the Principate—Changes in the Sources of Law.*

The change from the Republic to the Principate introduced no very sudden alterations in the sources of law or the methods of procedure. Both, as we shall see, were supplemented by new creations; but up to the time of Gaius it was possible to appeal to the Republican system as the one that underlay the legal life and the judicial organization of Rome[3]. All that was added by the

[1] Liv. xliii. 2. [2] Cic. *Brut.* 27. 106; *de Off.* ii. 21. 75.

[3] Yet it is to be observed that Gaius, in his statement of the sources of law (i. 2), puts those which were antiquated in his time (Lex and Plebiscitum) on the same level as those which were living. The statement is juristically correct, in so far as the body of Roman law in his time had sprung from all these

Principate was in the nature of an excrescence—one that was probably healthy in its effects, in spite of the fact that it does seem to have limited to a certain extent the creative activities of juristic thought. The birth of the Principate was not conditioned by strictly legal necessities. There seems to have been little sense that a single controlling force was needed for the guidance of the law of Rome, Italy, and the provinces. The justification for the Principate was found in the fact that a single controlling power was necessary for the command of the army and the routine administration of the provinces. But it was impossible to create such a power without bringing it into some contact with every department of the State. The guidance of legislation and judicature by an individual will was a necessary outcome of the new order of things; and it is possible that this guidance was needed. There is a stage in the history of law where liberty of interpretation may lead to perplexing uncertainty, and there is a stage in the history of any national judicial organization where certain radical methods are necessary to adapt it to new needs. The Principate gave a definiteness to law, but a definiteness that was in no sense illiberal. On the contrary, it prevented law from being narrowly Roman as effectually as it checked it from recklessly absorbing foreign elements. It adapted law to provincial needs by expanding, but not impairing, its national character. At the same time it widened the scope of jurisdiction by methods which we shall soon describe—methods which seem to have increased the efficiency at least of the civil courts at Rome, and which brought the provincial world into closer judicial relations with the capital. The changes effected both in legislation and in jurisdiction were gradual and progressive; and, though they were from a formal point of view initiated by the will of individual monarchs, it is important to remember that, at Rome as elsewhere, monarchical power is the outcome of the concurrence of many individual wills. For the sake of convenience we are accustomed to treat the Princeps as the chief source of law and the chief influence on jurisdiction. Sometimes a purely personal power of this type may have been realized for a while, although when so realized it always had a flavour of tyranny[1]. But as a rule, when we think of the Princeps as a source of law and justice, we should be thinking of his judicial advisers and assessors. The trained

sources; but the method of statement is likely to convey a false historical implication. Cf. pp. xlv–xlviii.

[1] We may instance the view of Caligula on the *jus respondendi* of the jurisconsults. Suetonius says (*Calig.* 34) 'De juris quoque consultis, quasi scientiae eorum omnem usum aboliturus, saepe jactavit "se mehercule effecturum ne quid respondere possint praeter eum."' This was a desire that found no fulfilment during the Principate.

jurist still plays a leading part in legal progress. His control of the Princeps, and the Princeps' control of him, must both be taken into account, although the actual extent of the respective influences—of the administrator over the jurist and of the jurist over the administrator—can never be determined for any given act or for any given moment of time.

A division of power of this type is perhaps common to all monarchies. But in the Roman Principate, which was not technically a monarchy, we find it expressed in yet another way—a way which is of more importance theoretically, although perhaps of less practical import. It is expressed in the form that the Princeps is merely the 'extraordinary magistrate' of a Republican Constitution. By an 'extraordinary magistracy' is meant a magistracy formed by an accumulation of functions, each of which is usually exercised by a particular magistrate. The chief powers with which the Princeps was invested were the Proconsulare Imperium conferred by the Senate, and the Tribunicia Potestas conferred on a recommendation of the Senate in a formal meeting of the People. The Proconsulare Imperium was technically valid only outside the limits of Italy; but, as it was absolutely necessary that the Princeps should possess Imperium within Rome, he was specially exempted from losing his Imperium by his presence within the city. The effect of this exemption probably was to create for the Princeps a kind of consular Imperium in Rome and Italy. But even this device was not sufficient to secure for him the authority which he required as a moderator of the whole State. The Proconsulare Imperium and the Tribunicia Potestas required to be supplemented by a number of separate powers conferred by special grants. These grants must originally have been made by special laws and decrees of the Senate that were passed at various times; but the practice seems soon to have been adopted of embodying them in a single enactment, which was submitted to the formal assent of the People at the time when the Proconsulare Imperium and the Tribunicia Potestas were conferred. A fragment of such an enactment is the extant Lex or Senatusconsultum which enumerates powers conferred on the Emperor Vespasian at his accession [1]. The rights of the Princeps enumerated in this document are of a very heterogeneous kind—they include the powers of making treaties, extending the *pomerium* of the city, commending candidates

[1] The document is to be found in the Corpus Inscriptionum Latinarum, vi. n. 930, and in Bruns, *Fontes Juris Romani Antiqui*, v. 19. It describes itself as a law (l. 34 'Si quis hujusce legis ergo,' &c.), and is generally known as the Lex de imperio Vespasiani. But its wording bears more analogy to that of a Senatusconsultum. It seems to be a decree of the Senate which is intended to be submitted to the People for their formal assent. See Mommsen, *Staatsr.* ii, p. 878.

for office, and issuing edicts as interpretations of law, human and divine; and, important as they are, they have no direct connexion with either the Proconsulare Imperium or the Tribunicia Potestas. Some of the most imposing powers of the Princeps were dependent on neither of these two sources, but were contained only in this general Lex; and, as fresh prerogatives were added to the Principate, the Lex would grow in bulk and importance. Some development of this kind may account for the fact that Gaius and Ulpian both speak of the Princeps receiving his Imperium through a Lex[1]. Such an expression could not have been used of the early Principes; for the Proconsulare Imperium was received through a decree of the Senate; but it is possible that in the course of time the general Lex, as enumerating the majority of the prerogatives of the Princeps, came to overshadow the other sources of his authority.

Since the authority of the Princeps was built up in this gradual and unsystematic way, it is quite impossible for the modern inquirer to determine with precision the sources of the exercise of his different powers. But a rough estimate may be made of five distinct kinds of prerogative and of the activities flowing from each. (1) With the Imperium were connected the control of the army and the provinces, the right of declaring war and of making treaties, the power of conferring Roman citizenship or Latin rights, civil and criminal jurisdiction, and the general power of legal interpretation. (2) The Tribunician Power, besides making the Princeps sacrosanct, gave him the right, exercised during the earlier period of the Principate but afterwards neglected, of initiating measures in the Assembly of the Plebs, and also the right of transacting business with the Senate, although this second right was extended by special grants. The power of veto, inherent in the Tribunicia Potestas, gave the Princeps a control over all the other magistrates of the State, enabled him to exercise over the jurisdiction of the Senate a power akin to that of pardon, and probably formed the basis of much of his appellate jurisdiction. (3) Two of the Principes, Claudius and Vespasian, were invested with the temporary office of censor, and Domitian declared himself censor for life. His example was not followed by succeeding rulers; but the most important of the functions of the censors—the revision of the lists of Senators and Knights—continued to be a part of the admitted prerogatives of the Princeps. Akin to this right was that of creating Patricians, which had been conferred

[1] Gaius, i. 5; Ulpian in Dig. 1. 4. 1: 'Quod principi placuit, legis habet vigorem; utpote cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat.' It has been questioned whether the expression *lex regia* was in vogue even in the time of Ulpian, and it may be an interpolation. The expression is found in Justinian (Cod. 1. 17. 1. 7). See Mommsen, *Staatsr.* ii, pp. 876, 877.

by law on Caesar and Augustus, had been exercised by Claudius and Vespasian as censors, and finally became a right inherent in the Principate itself. (4) The Princeps, besides being a member of all the great religious colleges, was, as Pontifex Maximus, the official head of the state-religion, and was invested by law with the power of executing ordinances which were to the interest of the religious life of the community [1]. (5) Supplementary powers, which cannot be described by a common name or connected with any definite office, were granted to the Princeps. Some of these were means by which his control over the magistrates and the Senate was increased. Such were the rights of securing the election of certain candidates for office by means of a recommendation (Commendatio), and of exercising powers in relation to the Senate superior to those possessed by the other magistrates.

An authority thus endowed could not fail to exercise a strong directing influence on the sources of law and the methods of procedure. The influence asserted itself from the first; yet for at least two centuries there was always a formal, and sometimes a real recognition of the theory on which the Principate was based—the theory of a dual control exercised by the Princeps on the one hand, by the usual organs of the Republic on the other. The chief organ by which the Republic was represented was now no longer the People, but the Senate; and the dual sovereignty—or 'Dyarchy,' as it has been called—can be illustrated chiefly by the division of authority between the Princeps and the Senate.

As regards the sources of law, even the utterances of the People were for some time elicited. Leges and Plebiscita—specimens of which are to be found in the Leges Juliae of Augustus, the Lex Aelia Sentia belonging to the reign of the same monarch, the Lex Junia Norbana of the reign of Tiberius, the Leges Claudiae of the Emperor Claudius — continued to be passed during the early Principate. The last trace of legislation belongs to the reign of Nerva (96–98 A.D.) [2].

Even before legislative power had been surrendered by the Comitia, it had begun to pass to the Senate; and down to the third century A.D., such general ordinances as tended to alter the fundamental legal relations of Roman citizens to one another were generally expressed in the form of Senatusconsulta. The Senatusconsultum was a true source of the Jus Civile. Yet it did not attain the formal structure, or always adopt the imperative utterance, of a law. Its utterances are often couched in an advisory form [3], as though the

[1] Lex de Imp. Vesp. l. 17.
[2] Dig. 47. 21. 3. 1.
[3] Thus the *S. C. Velleianum* begins: 'Quod Marcus Silanus et Velleus Tutor

Senate of this period, like that of the Republic, were merely giving counsel to a magistrate. Gaius attributes to these decrees 'the binding force of law'; and it does not seem that the early doubts as to whether the Senate could pass ordinances immediately binding on the community[1] survived the beginning of the Principate.

The Praetor's edict still continued to be issued; nor are we told that the edictal power was in any way infringed during the early Principate. But there are two considerations which would lead us to conclude that it was seriously weakened. The first is based on the fact that edictal power in the highest degree was conferred by law on the Princeps himself[2]; and the existence of two interpreters of the civil law possessing equal authority is almost inconceivable. The second consideration rests on the probability that the Praetor's rulings in detail were subject to the veto of the Princeps. A new ruling was often the basis for a new formula and a new edict, and if the first of these was inhibited, its successive developments could not be realized. Progressive legislation was effected elsewhere, in decrees of the Senate and in the imperial constitutions; and the final sign that the creative work of the Praetors was a thing of the past was given when, in the reign of Hadrian (117–138 A.D.), and therefore probably in the lifetime of Gaius, the work which Ofilius had begun[3] was perfected by the jurist Salvius Julianus. He reduced the edict to a fixed and definite system[4]; and from this time onward the Edictum Perpetuum was, in its essential features, unalterable. Absolute validity was given to the new redaction by a Senatusconsultum introduced by a speech from the Emperor Hadrian, who declared that any new point, not contemplated in the edict, should be decided by analogy with it[5]. It is probable that such new points were still mentioned in successive edicts; for it is certain that the edict still continued to be issued annually. The work of Julian could, therefore, never have been meant to be unalterable in a literal sense. Such invariability would indeed have been impossible; for, though changes in law were now beginning to be made chiefly by ordinances of the emperor, yet these very changes would necessitate corresponding changes in the details of the edict.

consules verba fecerunt . . . quid de ea re fieri oportet, de ea re ita censuere.' See Krüger, *op. cit.* p. 82.

[1] Gaius, i. 4. Cf. Ulpian in Dig. 1. 3. 9 'Non ambigitur senatum jus facere posse.' Papinian (Dig. 1. 1. 7) recognizes *senatusconsulta* as a source of *jus*.

[2] Lex de Imp. Vesp. l. 17 'Utique quaecunque ex usu rei publicae . . . censebit, ei agere facere jus potestasque sit.'

[3] P. xl.

[4] Victor, *Caes.* 19 'Primus edictum quod varie inconditeque a praetoribus promebatur in ordinem composuit.' Eutrop. viii. 17 'Perpetuum conposuit edictum.'

[5] Cod. 1. 17. 2. 18; Constitution Δέδωκεν (prefixed to Digest), 18.

The fixity of Julian's edict was to be found both in its structure and in its leading principles; in the order in which the rules of law were marshalled and in the general significance of these rules. It has been supposed that Julian's work was not confined to the edict of the Praetor Urbanus, but that he dealt also with the edicts of the Praetor Peregrinus and of the Curule Aediles[1]. He may have treated these edicts separately; but the three may have been combined in a single comprehensive work which was spoken of as 'The Edict[2].'

By the side of these sources of law which survived from the Republic stood the new authority, the Princeps. He was not regarded as, in the strict sense, a legislative authority; but he or his advisers exercised a profound influence on the growth and structure of law in virtue of his power of issuing Edicts, Decrees, Rescripts, and Mandates. The Edictum of the Princeps was, like that of the Praetor in the Republic, technically an interpretation of law, but, like the Praetor, the Princeps could supplement and alter under the guise of interpretation: and his creative power, as exercised by his edictal authority, was very great. An edict of an emperor did not necessarily bind his successors; but, if it had been accepted as valid by a series of emperors, it was considered to be a part of the law, and its subsequent abandonment had apparently to be specified by some definite act of repudiation[3]. The Decretum was a judgment of the Princeps as a court of justice; and, unless it was rescinded in a succeeding reign, its validity as a precedent seems to have been unquestioned. The Rescriptum was technically an answer to a letter by which the advice of the Princeps was sought; but the word soon came to be used for the Princeps' letter (Epistola) itself. It contained instructions either on administrative or on judicial matters. In its first capacity, it was addressed to some public official subordinate to the emperor; in its second, it was addressed either to the judge or to the litigant. It was elicited either as an answer to the consultation (Consultatio) of an official or a judge who hesitated as to his course of procedure, or as a reply to a petition (Libellus, Supplicatio) of one of the parties to a suit. The Rescript which dealt with judicial matters might settle a doubtful point of law by showing, or extending, the application of an existing principle to a new case. The Rescript was the most powerful instrument of law-making wielded by the Princeps. The definiteness of its form gave the opinion an authority

[1] We hear of the Edictum Aedilium in the Constitutions 'Omnem' (4) and Δέδωκεν (5) prefixed to the Digest.

[2] It is possible that the common elements in the provincial edicts were reduced to a system at this time. Cf. p. xxxiii.

[3] Paulus (Dig. 28. 2. 26) uses the expression 'Jam sublato edicto divi Augusti,' a phrase which suggests something more than mere neglect.

which, once accepted by a successor, could not easily be questioned; while the immense area over which these letters of advice were sent kept the Princeps in touch with the whole provincial world, and caused him to be regarded by the provincials as the greatest and most authentic interpreter of law. The Edicts, Decrees, and Rescripts came to be described by the collective name of 'Imperial Constitutions' (Constitutiones Principum), and by the time of Gaius they were held to possess, in a uniform degree, 'the binding force of law[1].' On a lower level, with respect to legal validity, stood the Mandatum. This was a general instruction given to subordinate officials, for the most part to governors of provinces, and dealt usually with administrative matters, although sometimes it had reference to a point of law. Such mandates might be, and often were, withdrawn by the Princeps who had issued them, or by his successor. Hence it was impossible to attach perpetual validity to their terms. But, when a mandate dealt with a precise point of law, and was renewed by successive emperors, it must have acquired the force of a Rescript[2].

§ 17. *Changes in Procedure under the Principate.*

The creation of the office of Princeps, and the extension of the authority of the Senate, exercised an influence on jurisdiction as well as on legislation. The two new features of the judicial system were the growth of extraordinary jurisdiction and the growth of Courts of Appeal. The name 'extraordinary' (*extra ordinem*) was given to all jurisdiction other than that of the ordinary civil and criminal courts (Judicia Ordinaria) which had survived the Republic. It often dealt with cases not fully provided for by these courts; and its chief characteristic was that the cognizance (Cognitio), both on the question of law and on the question of fact, was undertaken solely by the magistrate or by a delegate nominated by him (judex extra ordinem datus)[3]. In civil matters, the Princeps sat as such an extraordinary court, and either exercised, or delegated, jurisdiction in matters such as Trust or Guardianship. He might take other

[1] Gaius, i. 5. Cf. Ulpian in Dig. 1. 4. 1. 1 'Quodcumque . . . imperator per epistulam et subscriptionem statuit vel cognoscens decrevit . . . vel edicto praecepit, legem esse constat. Haec sunt quas vulgo constitutiones appellamus.'

[2] Thus the soldier's testament was created by a series of mandates (Dig. 29. 1. 1).

[3] Such a delegate might be given by the consuls when exercising extraordinary jurisdiction (Gell. xii. 13. 1 'Cum Romae a consulibus judex extra ordinem datus pronuntiare . . . jussus essem'). Such a judex represented the magistrate more fully than the judex of ordinary jurisdiction. He was not tied down within the limits of a formula.

cases, if he willed; but his jurisdiction was always voluntary; and, if he declined to act, the case went before the Praetor. In criminal matters, two high courts of voluntary and extraordinary jurisdiction were created—that of the Princeps and that of the Senate. The Princeps might take any case, but often limited his intervention to crimes committed by imperial servants or by officers of the army. The jurisdiction of the Senate was especially concerned with offences committed by members of the upper ranks of society, or with crimes of a definitely political character.

The system of appeal introduced by the Principate was of a complicated character, and many of its features are imperfectly understood. It seems that, at Rome, the Princeps could in civil matters veto, and perhaps alter, the decision of a Praetor, but could not annul the verdict of a Judex, except by ordering a new trial[1]. He could of course vary the decisions of his own delegates in matters of extraordinary jurisdiction. In criminal matters the Princeps does not seem to have had the power of altering the decisions of the Quaestiones Perpetuae; but he could probably order a new trial[2]. There was technically no right of appeal from the Senate to the Princeps[3]; but the Princeps could exercise what was practically a power of pardon by vetoing the decisions of the Senate in virtue of his Tribunicia Potestas. In the provincial world, the right of appeal was at first regulated in accordance with the distinction between Caesar's provinces and the provinces of the Roman people. From Caesar's provinces the appeal lay to Caesar; from the other provinces it came to the Consuls and, at least if it was concerned with a criminal matter, was by them transmitted to the Senate. But we know that this system of dual jurisdiction was breaking down even in the first century of the Principate, and that the appellate jurisdiction of the Princeps was tending to encroach on that of the Consuls and Senate[4]. The extent to which it had broken down in the time of Gaius is unknown. But we know that, by the end of the second century A. D., the Princeps was the Court of Appeal for the whole provincial world. For this purpose he was usually represented by the Prefect of the Praetorian Guard.

[1] This was done by the fiction of *In integrum restitutio*. Cf. Suet. *Claud.* 14 '(Claudius) iis, qui apud privatos judices plus petendo formula excidissent, restituit actiones.'

[2] The Emperor Gordian is spoken of as *παλινδικίαν διδοὺς τοῖς ἀδίκως κατακριθεῖσι* (Herodian, vii. 6. 4).

[3] Ulpian in Dig. 49. 2. 1. 2 'Sciendum est appellari a senatu non posse principem, idque oratione divi Hadriani effectum.' There can be little doubt that the principle was confirmed, not created, by Hadrian.

[4] Nero at the beginning of his reign in 54 A. D. professed a desire to restore the original principle (Tac. Ann. xiii. 4 'Teneret antiqua munia senatus, consulum tribunalibus Italia et publicae provinciae adsisterent').

§ 18. *The work of the Jurisconsults under the Principate.*

The official organs which made Roman law were now, as under the Republic, assisted by the unofficial or semi-official activity of the jurisconsults. Some of these teachers were now given public recognition as authoritative sources of law. We are told that Augustus granted the right to certain jurisconsults to respond under imperial authority; and this practice was continued by his successors on the throne. Amongst the earlier of these patented jurisconsults was Masurius Sabinus, of the time of the Emperor Tiberius[1]. The granting of this privilege did not diminish the activity of the unpatented lawyers[2], although it doubtless diminished their influence; but it gave the response of its possessor as authoritative a character as though it had proceeded from the emperor himself[3]. The response was usually elicited by a party to the suit and presented to the Judex[4]. He was bound by the decision[5]; but naturally only on the assumption that the facts as stated in the petition which elicited the Rescript were the facts as exhibited in the course of the trial[6]. It may have been understood that the opinion of only one patented counsellor was to be sought in any single case; for in the early Principate there seems to have been no provision determining the conduct of a Judex when the opinions of his advisers differed. Later it must have been possible to elicit the opinion of several patented jurists on a single issue; for the Emperor Hadrian framed the rule that, in the case of conflicting responses, a Judex should be entitled to use his own discretion[7].

§ 19. *Literary activity in the domain of Law to the time of Gaius.*

The literary activity in the domain of law, during the period which intervened between the accession of Augustus and the time of Gaius, was of the most varied character[8]. Religious law (Jus

[1] Pomponius in the Digest (1. 2. 48–50) says 'Massurius Sabinus (of the time of Tiberius) in equestri ordine fuit et publice primus respondit'; but he also adds: 'Primus divus Augustus, ut major juris auctoritas haberetur, constituit, ut ex auctoritate ejus responderent.' To make the statements square with one another, Mommsen would strike out the words 'fuit et' in the first paragraph, as being the addition of an interpolator. The statement would then be that Sabinus was the first patented jurisconsult of equestrian rank.

[2] This seems shown by the story told by Pomponius in Dig. 1. 2. 2. 49.

[3] Yet the response was not regarded as a delegation of the power of the Princeps to issue Rescripts. It may, however, have formed the model for the judicial Rescript. See Krüger, *op. cit.* p. 110, note 5.

[4] Not merely to the Judex privatus, but to the Judex extra ordinem datus, and even to the magistrate who was judging.

[5] Justin. *Inst.* i. 2. 8. [6] Krüger, *op. cit.* p. 110. [7] Gaius, i. 7.

[8] For a detailed description of this literature see Roby, *Introduction to the Study of Justinian's Digest*, pp. 124–174.

Pontificium) attracted the attention of Capito. Labeo wrote on the Twelve Tables. The Praetor's Edict was the subject of studies by Labeo, Masurius Sabinus, Pedius and Pomponius. The Edict of the Curule Aediles was commented on by Caelius Sabinus. Salvius Julianus, besides his redaction of the Edicts[1], produced a work known as Digesta, which perhaps assumed the form of detailed explanations of points of law systematically arranged. Comprehensive works on the Civil Law were furnished by Masurius Sabinus and Caius Cassius Longinus. Other jurists produced monographs on special branches of law, as the younger Nerva on Usucapion, Pedius on Stipulations, Pomponius on Fideicommissa. Some lawyers wrote commentaries on the works of their predecessors. It was thus that Aristo dealt with Labeo, and Pomponius with Sabinus. Other works took the form of Epistolae, which furnished opinions on special cases which had been submitted to their author, and collections of Problems (Quaestiones). Nor was history neglected. There must have been much of it in Labeo's commentary on the Twelve Tables; and Pomponius wrote a Handbook (Enchiridion), which contained a sketch of the legal history of Rome from the earliest times.

§ 20. *The Institutes of Gaius; their place in the Literature of Law.*

The Institutes of Gaius are a product of this activity; for it is necessary that a great deal of detailed and special work shall be done in a science before a good handbook on the subject can be written for the use of students. The name of Gaius's work does not appear in the manuscript; 'but[2] from the proem to Justinian's Institutes appears to have been INSTITUTIONES, or to distinguish it from the systems of rhetoric which also bore this name, INSTITUTIONES JURIS CIVILIS. From the way in which it is mentioned by Justinian, we may infer that for 350 years the *élite* of the youth of Rome were initiated in the mysteries of jurisprudence by the manual of Gaius, much as English law students have for many years commenced their labours under the auspices of Blackstone. It is probably in allusion to the familiarity of the Roman youth with the writings of Gaius that Justinian repeatedly calls him (e. g. Inst. proem. 6; Inst. 4, 18, 5; and in the Constitution prefixed to the Digest, and addressed ad Antecessores, § 1), "our friend Gaius" (Gaius noster). The shortness of the time that sufficed Tribonian and his colleagues for the composition of Justinian's Institutes

[1] P. xlvii.
[2] These passages in inverted commas are taken from Mr. Poste's preface to the third edition of his work.

(apparently a few months towards the close of the three years devoted to the compilation of the Digest, Inst. proem) is less surprising when we see how closely Tribonian has followed the arrangement of Gaius, and how largely, when no change of legislation prohibited, he has appropriated his very words.'

'Certain internal evidences fix the date at which portions of the Institutions were composed. The Emperor Hadrian is spoken of as departed or deceased (Divius) except in 1. § 47 and 2. § 57. Antoninus Pius is sometimes (1. § 53, 1. § 102) named without this epithet, but in 2. § 195 has the style of Divus. Marcus Aurelius was probably named, 2. § 126, and the Institutions were probably published before his death, for 2. § 177 contains no notice of a constitution of his, recorded by Ulpian, that bears on the matter in question. Paragraphs 3. § 24, 25, would hardly have been penned after the Sc. Orphitianum, A. D. 178, or the Sc. Tertullianum, A. D. 158.' It has, however, been held that Gaius when he wrote the Institutions was acquainted with the Sc. Tertullianum, and that a mention of it occupied a gap in the manuscript which is found in 3. 33. See the commentary on this passage.

The discovery of the text of the Institutions was made in 1816. In that year 'Niebuhr noticed in the library of the Cathedral Chapter at Verona a manuscript in which certain compositions of Saint Jerome had been written over some prior writings, which in certain places had themselves been superposed on some still earlier inscription. In communication with Savigny, Niebuhr came to the conclusion that the lowest or earliest inscription was an elementary treatise on Roman Law by Gaius, a treatise hitherto only known, or principally known, to Roman lawyers by a barbarous epitome of its contents inserted in the Code of Alaric II, King of the Visigoths (§ 1, 22, Comm.). The palimpsest or rewritten manuscript originally contained 129 folios, three of which are now lost. One folio belonging to the Fourth Book (§ 136–§ 144), having been detached by some accident from its fellows, had been published by Maffei in his *Historia Teologica*, A.D. 1740, and republished by Haubold in the very year in which Niebuhr discovered the rest of the codex.'

'Each page of the MS. generally contains twenty-four lines, each line thirty-nine letters; but sometimes as many as forty-five. On sixty pages, or about a fourth of the whole, the codex is doubly palimpsest, i.e. there are three inscriptions on the parchment. About a tenth of the whole is lost or completely illegible, but part of this may be restored from Justinian's Institutes, or from other sources; accordingly, of the whole Institutions about one-thirteenth is wanting, one half of which belongs to the Fourth Book.'

'From the style of the handwriting the MS. is judged to be older

than Justinian or the sixth century after Christ; but probably did not precede that monarch by a long interval.'

'In a year after Niebuhr's discovery the whole text of Gaius had been copied out by Goeschen and Hollweg, who had been sent to Verona for that purpose by the Prussian Royal Academy of Sciences, and in 1820 the first edition was published. In 1874 Studemund published an apograph or facsimile volume, the fruits of a new examination of the Veronese MS.; and in 1877 Studemund, with the assistance of Krueger, published a revised text of Gaius founded on the apograph.'

'In the text of Gaius, the words or portions of words which are purely conjectural are denoted by italics. The orthography of the Veronese MS. is extremely inconstant. Some of these inconstancies it will be seen are retained: e.g. the spelling oscillates between the forms praegnas and praegnans, nanctus and nactus, erciscere and herciscere, prendere and prehendere, diminuere and deminuere, parentum and parentium, vulgo and volgo, apud and aput, sed and set, proxumus and proximus, affectus and adfectus, inponere and imponere &c. Some irregularities likely to embarrass the reader, e.g. the substitution of v for b in debitor and probare, the substitution of b for v in servus and vitium, have been tacitly corrected. The numeration of the paragraphs was introduced by Goeschen in his first edition of Gaius, and for convenience of reference has been retained by all subsequent editors. The rubrics or titles marking the larger divisions of the subject, with the exception of a few at the beginning, are not found in the Veronese MS. Those that are found are supposed not to be the work of Gaius, but of a transcriber. The remainder are partly taken from the corresponding sections of Justinian's Institutes, partly invented or adopted from other editors.'

§ 21. *The Life and Works of Gaius.*

Of the life of Gaius we know little. Even his full name has been lost; for, if 'Gaius' is the familiar Roman praenomen[1], he must have had a family or gentile name as well. It is probable that he was a foreigner by birth—a Greek or a Hellenised Asiatic; but it is also probable that he was a Roman citizen, and possible that he taught at Rome. It is not likely that he belonged to the class of patented jurisconsults; for his opinions are not quoted by the subsequent jurists whose fragments are preserved in the Digest; it has even been

[1] It is a curious fact that Gaios (Γάϊος) is found as the name of an Asiatic (Gaios, son of Hermaeus, one of the σύντροφοι of Mithridates Eupator, King of Pontus. See Delian inscription in Th. Reinach, *Mithridate Eupator, roi du Pont*, p. 52, and Plut. *Pomp.* 42). Yet, if Gaius the jurist was a Roman citizen, we should have expected him to bear a Roman, or Romanised, name.

inferred that he was not a practising lawyer; for amidst his voluminous writings there is no trace of any work on Quaestiones. His treatises may all have been of a professorial kind. They included, beside the Institutions, Commentaries on the Provincial Edict and the Urban Edict; a work on the Lex Julia et Papia Poppaea; a Commentary on the Twelve Tables; a book called Aurea or Res Quotidianae, treating of legal doctrines of general application and utility in every-day life; a book on Cases (apparently of a hypothetical character); one on Rules of Law (Regulae); and special treatises on Verbal Obligations, Manumissions, Fideicommissa, Dowries, and Hypotheca. He also wrote on the Tertullian and Orphitian Senatusconsults. Gaius's Commentary on the Provincial Edict is the only work of the kind known to us. It is not necessary to believe that this Provincial Edict was the edict of the particular province (perhaps Asia) of which he was a native. It may have been a redaction of the elements common to all Provincial Edicts [1].

The value attached to Gaius's powers of theoretical exposition, and to the admirable clearness and method which made his Institutions the basis of all future teaching in Roman law, must have been great; for, in spite of the fact that he was not a patented jurisconsult, he appears by the side of Papinian, Paulus, Ulpian, and Modestinus, in the 'Law of Citations' issued by Theodosius II and Valentinian III in 426 A. D. The beginning of this enactment runs [2]: 'We accord our approval to all the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, granting to Gaius the same authority that is enjoyed by Paulus, Ulpian and the others, and sanctioning the citation of all his works.'

Although so little is known of Gaius, yet his date can be approximately determined from the internal evidence of his works. 'We know that he flourished under the Emperors Hadrian (117–138 A. D.), Antoninus Pius (138–161 A. D.) and Marcus Aurelius Antoninus (161–180 A. D.). Gaius himself mentions that he was a contemporary of Hadrian, Dig. 34, 5, 7 pr. He apparently wrote the First Book of his Institutions under Antoninus Pius, whom he mentions, § 53, § 74, § 102, without the epithet Divus (of divine or venerable memory), a term only applied to emperors after their decease, but in the Second Book, § 195, with this epithet. The Antoninus mentioned, § 126, is either Pius or Marcus Aurelius Philosophus. Respecting the rules of Cretio, 2. § 177 Gaius appears not to be cognizant of a Constitution of Marcus Aurelius mentioned by Ulpian, 22, 34. That he survived to the time of Commodus appears from his having written a treatise on the Sc. Orphitianum (178 A. D.), an enactment

[1] Cf. p. xxxiii and p. xlvii, note 2.

[2] Cod. Theod. 1. 4. 3.

passed under that emperor' during his joint rule with his father Marcus Aurelius (177–180 A.D.). This is the latest date which is traceable in the life of Gaius.

Gaius was thus an elder contemporary of Papinian, who had already entered active life in the reign of Marcus Aurelius; and he stands at the threshold of that brilliant period of the close of Roman Jurisprudence which contains the names of Scaevola, Papinian, Ulpian and Paulus, and extends from the reign of Marcus Aurelius to that of Severus Alexander (180–235 A.D.).

COMMENTARIVS PRIMVS

DE IVRE

[I. DE IVRE CIVILI ET NATVRALI.]

§ 1. *Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quis*|que populus ipse sibi ius constituit, id ipsius proprium est uocaturque ius ciuile, quasi ius proprium ciuitatis; quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur. populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utit*ur*. quae singula qualia sint, suis locis proponemus.

Dig. 1, 1, 9 (Gaius), Inst. 1, 2, 1.

§ 2. Constant autem iura populi Romani ex legibus, plebiscitis, senatusconsultis, constitutionibus principum, edictis eorum qui ius edicendi habent, responsis prudentium.

Inst. 1, 2, 3.

§ 3. Lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione uniuersi ciues significantur, connumeratis et*iam* patriciis; plebis autem appellatione sine patriciis ceteri ciues significantur; unde olim patricii dicebant plebiscitis se non teneri, qu*ia* sine auctoritat*e* eorum facta essent; sed postea

ON CIVIL LAW AND NATURAL LAW.

§ 1. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members are peculiar to itself, and are called jus civile; the rules constituted by natural reason for all are observed by all nations alike, and are called jus gentium. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be explained in detail in each place as it occurs.

§ 2. Roman law consists of statutes, plebiscites, senatusconsults, constitutions of the emperors, edicts of magistrates authorized to issue them, and opinions of jurists.

§ 3. A statute is a command and ordinance of the people: a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians. Whence in former times the patricians maintained that they were not bound by the plebiscites, as passed without their authority; but afterwards

lex Hortensia lata est, qua cautum est ut plebiscita uniuersum populum tenerent; itaque eo modo legibus exaequata sunt. Inst. 1, 2, 4.

§ 4. Senatusconsultum est quod senatus iubet atque constituit, idque legis uicem optinet, quamuis fuerit quaesitum. Inst. 1, 2, 5.

§ 5. Constitutio principis est quod imperator decreto uel edicto uel epistula constituit. nec umquam dubitatum est, quin id legis uicem optineat, cum ipse imperator per legem imperium accipiat. Inst. 1, 2, 6; Dig. 1, 4, 1.

§ 6. ———————— ius autem edicendi habent magistratus populi Romani; sed amplissimum ius est in edictis duorum praetorum, urbani et peregrini, quorum in prouinciis iurisdictionem praesides earum habent; item in edictis aedilium curulium, quorum iurisdictionem in prouinciis populi Romani quaestores habent; nam in prouincias Caesaris omnino quaestores non mittuntur, et ob id hoc edictum in his prouinciis non proponitur. Inst. 1, 2, 7.

§ 7. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur. Inst. 1, 2, 8.

a statute called the lex Hortensia was enacted, which provided that the plebiscites should bind the people, and thus plebiscites were made co-ordinate with statutes.

§ 4. A senatusconsult is a command and ordinance of the senate, and has the force of a statute, a point which was formerly controverted.

§ 5. A constitution is law established by the emperor either by decree, edict, or letter; and was always recognized as having the force of a statute, since it is by a statute that the emperor himself acquires supreme executive power.

§ 6. Power to issue edicts is vested in magistrates of the people of Rome, the amplest authority belonging to the edicts of the two praetors, the home praetor and the foreign praetor, whose provincial jurisdiction is vested in the presidents of the provinces, and to the edicts of the curule aediles, whose jurisdiction in the provinces of the people of Rome is vested in quaestors: in the provinces of the emperor no quaestors are appointed, and in these provinces, accordingly, the edict of the aediles is not published.

§ 7. The answers of jurists are the decisions and opinions of persons authorized to lay down the law. If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late emperor Hadrian.

§ 1. Jurisprudence treats exclusively of positive law: the exclusive origin of positive law is some positive enactment; the term positive enactment including both the express or direct enactments

of the political sovereign, and the implied, indirect, circuitous enactments imported by the sovereign's acquiescence in the ruling of subordinate authorities. (See Holland's Jurisprudence, chs. 2–5.)

The rules and principles denoted by the terms praetor-made law, jurist-made law, judge-made law, are only law because they are impliedly adopted, confirmed, and ratified by the silent acquiescence of the sovereign.

The organ by which the jus gentium of the Romans was promulgated, which made it by indirect enactment a portion of Roman Positive law, was principally the Edict of the Praetor. The relations of Roman citizens with aliens (peregrini), that is, with the members of foreign states formerly subjugated by Rome and now living under the protection of Roman law, as well as of aliens in their intercourse with one another, became, about 242 B.C., so frequent as to be made subject to the jurisdiction of a special minister of justice called Praetor peregrinus, who, like the Praetor urbanus, published an annual edict announcing the principles on which justice would be administered. These principles composed jus gentium as opposed to jus civium. Jus gentium, that is to say, was not really, as Roman jurists imagined or represented, a collection of the principles common to the legislation of all nations, but a body of rules which the Roman praetor thought worthy to govern the intercourse of Roman citizens with the members of all, originally independent, but now subject, foreign nations.

Gradually the rules originating in this way were extended to the intercourse of citizens with citizens, in cases where the rigorous conditions of jus civile were not exactly satisfied, and so precepts of jus gentium were transferred from the edict of praetor peregrinus to the edict of praetor urbanus.

The portion of the edict most fertile in principles of jus gentium would be the clauses in which the praetor announced, as he did in some cases, that he would instruct the judex, whom he appointed to hear and determine a controversy, to govern himself by a consideration of what was aequum et bonum, i.e. by his views of equity and expediency: and if any of the oral formularies of the earliest system of procedure (legis actiones) contained these or equivalent terms, such formularies may be regarded as a source of jus gentium. It may be observed that Gaius does not, like some other Roman jurists and notably Ulpian (cf. Dig. 1, 1, 1, 3; Inst. 1, 2 pr.), make any distinction between jus gentium and jus naturale. There is nothing in his writings, as they have come down to us, to draw attention to the fact that the teaching of nature may not be in accordance with the practice of nations, as the institution of slavery showed.

Another organ of quasi publication, whereby the rules of jus gentium were transformed from ideal law to positive law—from laws of Utopia to laws of Rome—were the writings of the jurists, who, at first with the tacit, afterwards with the express permission of the legislature, engaged, nominally in interpreting, really in extending the law, about the time of Cicero (De Legibus, § 1, 5), transferred to the edict of the praetor the activity which they had formerly displayed in developing the law of the Twelve Tables and the statutes of the Comitia. By these means, supplemented and confirmed by statute law and custom, the jus gentium gradually increased in importance, and gave the Roman empire its universal law.

Jus civile, i.e. jus civium or law peculiar to citizens, was the law of the Twelve Tables, augmented by subsequent legislation, by juristic interpretation, and by consuetudinary law. The institutions of jus civile may be exemplified by such titles to property as Mancipatio and In Jure Cessio, contracts by the form of Nexum and Sponsio, title to intestate succession by Agnatio or civil relationship; while corresponding institutions of jus gentium were the acquisition of property by Tradition, contract by Stipulation without the solemn term Spondeo, title to intestate succession by Cognatio or natural relationship. Other departments of life were not subject to parallel institutes of jus civile and jus gentium, but the mutual relations of citizens with citizens as well as of citizens with aliens were exclusively controlled by jus gentium: e.g. the informal contracts called Consensual, such as buying and selling, letting and hiring, partnership; and the informal contracts called Real, such as the contract of loan for use or loan for consumption.

Titles to ownership (jus in rem), according to jus gentium, which ultimately superseded civil titles, are explained at large in Book II.

In respect of Obligation (jus in personam), jus gentium may be divided into two classes, according to the degree in which it was recognized by Civil law:—

A. A portion of jus gentium was recognized as a ground of Action. To this class belong (1) the simple or Formless contracts to which we have alluded, (2) obligations to indemnify grounded on delict, (3) rights quasi ex contractu to recover property when it has been lost by one side and gained by the other without any right to retain it. Dig. 12, 6, 14 and Dig. 25, 2, 25. Actions founded on this obligation to restore (condictiones), although it was a species of naturalis obligatio, Dig. 12, 6, 15 pr., were as rigorous (stricti juris) as any in the Civil code. In these cases the obligatio, though naturalis as founded in jus gentium, yet, as actionable, was said to be civilis obligatio, not naturalis, Dig. 19, 5, 5, 1.

The two eminently Civil spheres of the law of obligation were (1) specialty or Formal contracts, and (2) penal suits. Yet even into these provinces jus gentium forced a partial entrance. We shall see that aliens could be parties to a Stipulatio or Verbal contract, though not by the Civil formulary, Spondeo 3 § 93; and to Transcriptio, at least of one kind, 3 § 133, which was a form of Literal contract; and could be made plaintiffs or defendants in penal suits by means of the employment of certain Fictions, 4 § 37. This, however, was rather the extension of jus civile to aliens than the intrusion of jus gentium into a Civil province.

B. Other rights and obligations of jus gentium were not admitted as direct grounds for maintaining an action, yet were otherwise noticed by the institutes of civil jurisprudence and indirectly enforced. Thus a merely naturalis obligatio, though not actionable, might (1) furnish a ground of an equitable defence (exceptio): for instance, on payment of a merely natural debt the receiver has a right of retention, and can bar the suit to recover it back as a payment made in error (condictio indebiti soluti) by pleading the naturalis obligatio, Dig. 12, 6, 64; or the defendant can meet a claim by Compensatio, 4 § 61, cross demand or set-off, of a debt that rests on merely naturalis obligatio, Dig. 40, 7, 20, 2: or a merely naturalis obligatio might (2) form the basis of an accessory obligation, such as Suretyship (fidejussio) 3 § 119 *a*, or Guaranty (constitutum) Dig. 13, 5, 1, 7, or Mortgage (pignus) Dig. 20, 1, 5 pr., or Novation, 3 § 176, Dig. 46, 2, 1, 1, all institutions, which are themselves direct grounds of action. Though these rights and obligations of natural law are imperfect (obligatio tantum naturalis) as not furnishing immediate grounds of action, yet, as being partially and indirectly enforced by Roman tribunals, they clearly compose a portion of Positive law. Cf. 3 §§ 88, 89 comm.

§ 3. Plebiscites as well as the enactments of the Comitia populi were called Leges, and were named after the tribunes by whom they were carried, as the leges proper (rarely called populiscita) were named after the consul, praetor or dictator by whom they were carried. Thus Lex Canuleia, Lex Aquilia, 3 § 210, Lex Atinia, Inst. 2, 6, 2, Lex Furia testamentaria, 2 § 225, were plebiscites named after tribunes, while the Lex Valeria Horatia was named after two consuls, the Lex Publilia and Lex Hortensia were named after dictators, the Lex Aurelia, 70 B.C., after a praetor. (As to the history of plebiscita and leges and of the other sources of Roman law cf. Historical Introduction and see Smith's Dict. of Greek and Roman Antiquities, 3rd ed. s.v.)

§ 4. The legislative power of the senate was in the time of the republic a matter of controversy. It is certain that it had a power

of issuing certain administrative decrees or instructions to magistrates that was hardly distinguishable from legislation. Under the emperors matters were changed. Legislation by the Comitia, though spoken of by Gaius in the present tense, had ceased to be a reality after the time of Tiberius, and the last recorded lex was passed in the reign of Nerva. As early as the time of Augustus the auctoritas of the senate began to be regarded as the essential process in making a law, and the subsequent rogatio of the Comitia as a mere formality, which was finally omitted. Senatusconsults, like laws, were sometimes named after the cônsuls who proposed them, though this is not in their case an official designation; they are sometimes even called leges: thus the measure which Gaius calls Sc. Claudianum, § 84, is subsequently referred to by him under the name of lex, § 157, 4 §§ 85, 86. Ulpian says, Non ambigitur senatum jus facere posse, Dig. 1, 3, 9. Of course, these senatusconsults were merely a disguised form of imperial constitution. The sovereignty had in fact passed from both patricians and plebeians to the hands of the princeps. A measure was recommended by the emperor in an oratio or epistola to the senate, and then proposed by the consul who convoked the senate, and voted by the senate without opposition. Hence a senatusconsult is sometimes called oratio, e.g. oratio divi Marci, Dig. 2, 12, 1 pr. Even this form was finally disused. No senatusconsult relating to matters of civil law occurs after the time of Septimius Severus.

§ 5. Although when Gaius wrote the emperor had not yet acquired the formal right of making statutes, his supreme executive power enabled him to give to his constitutions the same force as if they had been leges. The legal origin and character of the different forms of imperial constitution has been much controverted, and certainly varied at different periods.

Edicts were legislative ordinances issued by the emperor in virtue of the jurisdiction appertaining to him as highest magistrate, and were analogous to the edicts of the praetors and aediles. In the time of Gaius they had only binding force during the life of the emperor who issued them, requiring the confirmation of his successor for their continuing validity; but from the reign of Diocletian, when the empire assumed an autocratic form, their duration ceased to be thus limited.

Decreta were judicial decisions made by the emperor as the highest appellate tribunal: or in virtue of his magisterial jurisdiction, and analogous to the extraordinaria cognitio of the praetor.

Epistolae or rescripta were answers to inquiries addressed to the emperor by private parties or by judges. They may be regarded as

interpretations of law by the emperor as the most authoritative juris peritus. Cf. § 94 comm.

Some examples of direct legal changes made by early emperors are recorded, as the right conferred by the edict of Claudius mentioned in § 32 *c* of this book.

The words of Gaius explaining why constitutions had the force of law seem to be imperfect, and may be supplemented from Justinian, who openly asserts for himself absolute authority: Sed et quod principi placuit legis habet vigorem: cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem concessit, Inst. 1, 2, 6. The lex imperii, Cod. 6, 23, 6, was called in this and in the corresponding passage of the Digest (1, 4, 1) attributed to Ulpian, lex regia, in memory of the lex curiata, whereby the kings were invested with regal power. According to Cicero the king was proposed by the senate and elected by the Comitia Curiata, and the election was ratified in a second assembly presided over by the king; e. g. Numam Pompilium regem, patribus auctoribus, sibi ipse populus adscivit, qui ut huc venit, quanquam populus curiatis eum comitiis regem esse jusserat, tamen ipse de suo imperio curiatam legem tulit, De Republ. 2, 13. According to Mommsen and other modern writers, however, the later Roman idea, that the king was elected by the Comitia, is wrong, the lex curiata having been passed, not to elect a king, but merely to ratify a previous election or nomination. A lex curiata was also passed to confer on a Roman magistratus his imperium, and similarly the Roman emperor derived some of his powers from leges, but it seems a mistake to suppose that in the time of the principate a single lex gave him his entire authority. A fragment of a bronze tablet, on which was inscribed the lex investing Vespasian with sovereign powers, was discovered at Rome in the fourteenth century, and is still preserved in the Capitol.

§ 6. Huschke points out that the vacant space in the MS. before jus probably contained a definition of Edicta.

All the higher magistrates of Rome were accustomed to issue edicts or proclamations. Thus the consuls convoked the comitia, the army, the senate, by edict: the censors proclaimed the approaching census by edict: the aediles issued regulations for the market by edict: and magistrates with jurisdiction published edicts announcing the rules they would observe in the administration of justice, the Edicts of the Praetor urbanus, Praetor peregrinus, Aediles curules being called Edicta urbana, while the Edicts of the governors of provinces were called Edicta provincialia. These edicts, besides being orally proclaimed, were written on white tablets (in albo) and suspended in the forum: apud forum palam ubi de plano legi possit, Probus, 'in the forum in an open space where persons

standing on the ground may read.' Such an edict was always published on entering on office (est enim tibi jam, cum magistratum inieris et in concionem adscenderis, edicendum quae sis observaturus in jure dicendo, Cic. De Fin. 2, 22), and was then called Edictum perpetuum, as opposed to occasional proclamations, Edictum repentinum. A clause (pars, caput, clausula, edictum) retained from a former edict was called Edictum tralaticium, Gellius, 3, 18; and though doubtless the edicts gradually changed according to changing emergencies, each succeeding praetor with very slight modifications substantially reproduced the edict of his predecessor. In the reign of Hadrian the jurist Salvius Julianus, called by Justinian Praetoriani edicti ordinator, reduced the edict to its definite form, and if the yearly publication was not discontinued (cf. § 6, jus edicendi habent), at all events Julian's co-ordination of Praetorian law was embodied in all subsequent publications. Such was the origin of jus honorarium (praetorium, aedilicium), as opposed to jus civile: and from what has preceded, it need hardly be stated that the antithesis, jus civile, jus honorarium, is to a great extent coincident with the antithesis, jus civile, jus gentium.

It may be observed that Gaius does not attribute to edicts the force of a statute: and this theoretical inferiority of jus honorarium had a vast influence in modelling the forms and proceedings of Roman jurisprudence. The remedy or redress administered to a plaintiff who based his claim on jus civile differed from that administered on an appeal to jus honorarium, as we shall see when we come to treat of Bonitary ownership, Bonorum possessio, Actio utilis, in factum, ficticia. This difference of remedy preserved jus civile pure and uncontaminated, or at least distinguishable from jus honorarium; but this perpetuation of the memory of the various origins of the law, like the analogous distinction of Equity and Common law in English jurisprudence, was purchased by sacrificing simplicity of rule and uniformity of process.

The legislative power of the popular assembly and the absence of legislative power in the senate and praetor were marked by a difference of style in the lex and plebiscite, edict, and decree of the senate: while the lex and plebiscite employed the imperative (damnas esto, jus potestasque esto, &c.), the resolutions of the senate scrupulously avoid the imperative and are clothed in the forms placere, censere, arbitrari, &c., as if they were rather recommendations than commands: and the edicts and the interdicts of the praetor are couched in the subjunctive (Exhibeas, Restituas, &c.), a milder form of imperative. Or to show that their force and operation is limited to his own tenure of office, they are expressed in the first person (actionem dabo, ratum habebo, vim fieri veto). Where

he has authority to command he shows it by using the imperative, as in addressing the litigants (mittite ambo hominem, inite viam, redite, 4 § 13 comm.) or the judge (judex esto, condemnato, absolvito). Ihering, § 47.

In the first period of the empire, that is, in the first three centuries of our era, it was the policy of the emperors to maintain a certain show of republican institutions, and the administration of the empire was nominally divided between the princeps or emperor and the people as represented by the senate. Thus, at Rome there were two sets of magistrates, the old republican magistrates with little real power, consuls, praetors, tribunes, quaestors, in outward form elected by the people; and the imperial nominees with much greater real authority, under the name of praefecti, the praefectus urbi, praefectus praetorio, praefectus vigilum, praefectus annonae, praefectus aerario; for though nominally the people and princeps had their separate treasuries under the name of aerarium and fiscus, yet the treasury of the people was not managed by quaestors as in the time of the republic, but by an official appointed by the emperor. Similarly the provinces were divided between the people and the prince, the people administering those which were peaceful and unwarlike, the prince those which required the presence of an army. The governor of a province, whether of the people or the emperor, was called Praeses Provinciae. The Praeses of a popular province was a Proconsul, and the chief subordinate functionaries were Legati, to whom was delegated the civil jurisdiction, and quaestors, who exercised a jurisdiction corresponding to that of the aediles in Rome. The emperor himself was in theory the Proconsul of an imperial province; but the actual governor, co-ordinate with the Proconsul of a senatorial province, was the Legatus Caesaris, while the financial administration and fiscal jurisdiction were committed to a functionary called Procurator Caesaris, instead of the republican Quaestor. Sometimes the same person united the office of Procurator and Legatus, as, for instance, Pontius Pilate.

§ 7. The opinions of a jurist had originally only the weight that was due to his knowledge and genius; but on the transfer of power from the hands of the people to those of the princeps, the latter recognized the expediency of being able to direct and inspire the oracles of jurisprudence; and accordingly Augustus converted the profession of jurist into a sort of public function, giving the decisions of certain authorized jurists the force of law, Pomponius in Dig. 1, 2, 49 (cf. Inst. 1, 2, 8). 'Until Augustus, the public decision of legal questions was not a right conferred by imperial grant, but any one who relied on his knowledge advised the clients who chose to

consult him. Nor were legal opinions always given in a letter closed and sealed, but were generally laid before the judge in the writing or by the attestation of one of the suitors. Augustus, in order to increase their weight, enacted that they should be clothed with his authority, and henceforth this office was sought for as a privilege.' Those jurists who had the jus respondendi were called juris auctores. Their auctoritas resided, in the first instance, in their responsa, or the written opinions they gave when consulted on a single case; but in the second instance, doubtless, in their writings (sententiae et *opiniones*), which were mainly a compilation of their responsa, a fact which has left its traces in the disjointed and incoherent style which disagreeably characterizes Roman juristic literature. The jus respondendi instituted by Augustus and regulated by Tiberius, who themselves held the office of Pontifex Maximus, gave those to whom it belonged similar authority in interpreting law as had previously been exercised by the College of Pontifices—'omnium tamen harum et interpretandi scientia et actiones apud Collegium Pontificum erant, ex quibus constituebatur, quis quoque anno praeesset privatis' (Pomponius in Dig. 1, 2, 6; cf. Sohm, § 18).

As to the mode of collecting the opinions of the juris auctores no precise information has come down to us, but § 6 shows that the duty of the judex, in the not uncommon event of the authorities differing in their opinions on a case, was open to doubt, till Hadrian's rescript allowed him under these circumstances to adopt the opinion he preferred. It may be gathered from the words 'quorum omnium' that all authorized jurists had to be consulted. The jus respondendi, as thus explained, may have continued in existence till the end of the third century, by which time the originative force of Roman jurisprudence had ceased. Instead of giving independent opinions jurists had become officials of the emperor, advising him in drawing rescripts and other affairs of imperial government. Legal authority rested in the writings of deceased juris auctores. (For a discussion of the causes of the decline of Roman Jurisprudence see Grueber's Art. in Law Quarterly Review, vii. 70.) In the course of centuries the accumulation of juristic writings of co-ordinate authority was a serious embarrassment to the tribunals. To remedy this evil, A. D. 426, Valentinian III enacted what is called the law of citations, Cod. Theodosianus, 1, 4, 3, limiting legal authority to the opinions of five jurists, Gaius, Papinian, Ulpian, Paulus, Modestinus, and of any other jurists whom these writers quoted, provided that such quotations should be verified by reference to the original writings of these jurists (codicum collatione firmentur—on the question of the way of interpreting these words cf. Sohm, p. 122, n. 1, § 21). In case

of a divergence of opinion, the authorities were to be counted, and the majority was to prevail. In case of an equal division of authorities, the voice of Papinian was to prevail. A. D. 533, Justinian published his Digest or Pandects, a compilation of extracts from the writings of the jurists, to which, subject to such modifications as his commissioners had made in them, he gives legislative authority. Every extract, accordingly, is called a lex, and the remainder of the writings of the jurists is pronounced to be absolutely void of authority. To prevent the recurrence of the evil which his codification was intended to remove, and confident in the lucidity and adequacy of his Digest and Code, which latter is a compilation of imperial statute law after the model of the Theodosian code, Justinian prohibits for the future the composition of any juristic treatise or commentary on the laws. If any one should disregard the prohibition, the books are to be destroyed and the author punished as guilty of forgery (falsitas), Cod. 1, 17, 2, 21. The constitutions enacted by Justinian subsequent to the publication of his code are called Novellae, Constitutiones or Novels.

We shall find frequent allusions, as we proceed in this treatise, to the existence of rival schools among the Roman juris auctores. This divergence of the schools dates from the first elevation of the jurist to a species of public functionary, namely, from the reign of Augustus, in whose time, as we have seen, certain jurists began to be invested by imperial diploma with a public authority. In his reign the rival oracles were M. Antistius Labeo and C. Ateius Capito: Hi duo primum veluti diversas sectas fecerunt, Dig. 1, 2, 47. 'The first founders of the two opposing sects.' From Labeo's works there are 61 extracts in the Digest, and Labeo is cited as an authority in the extracts from other jurists oftener than any one else except Salvius Julianus. From Sempronius Proculus, a disciple of Labeo, and of whom 37 fragments are preserved in the Digest, the school derived its name of Proculiani. Other noted jurists of this school were Pegasus, in the time of Vespasian; Celsus, in the time of Domitian, who gave rise to the proverb, responsio Celsina, a discourteous answer, and of whom 141 fragments are preserved; and Neratius, of whom 63 fragments are preserved. To the other school belonged Masurius Sabinus, who flourished under Tiberius and Nero, and from whom the sect were called Sabiniani. To the same school belonged Caius Cassius Longinus, who flourished under Nero and Vespasian, and from whom the sect are sometimes called Cassiani: Javolenus Priscus, of whom 206 fragments are preserved: Salvius Julianus, the famous Julian, above mentioned, of whom 456 fragments are preserved: Pomponius, of whom 578 fragments are preserved: Sextus Caecilius Africanus, celebrated for his obscurity, so that Africani lex in the language of lawyers meant lex

difficilis, of whom 131 fragments are preserved: and, lastly, our author, Gaius, who flourished under Hadrian, Antoninus Pius, and Marcus Aurelius, and from whose writings 535 extracts are to be found in the Digest.

If we now inquire whether this divergence of schools was based on any difference of principle, the answer is, No: on none, at least, that modern commentators have succeeded in discovering: it was merely a difference on a multitude of isolated points of detail. We are told indeed that the founders were men of dissimilar characters and intellectual dispositions: that Labeo was characterized by boldness of logic and a spirit of innovation; while Capito rested on tradition and authority, and inclined to conservatism, Dig. 1, 2, 47; but it is altogether impossible to trace their opposing tendencies in the writings of their successors: and we must suppose that the intellectual impulse given by Labeo was communicated to the followers of both schools of jurisprudence. But though, as we have stated, no difference of principle was involved, each school was accustomed to follow its leaders or teachers (praeceptores) with much servility; and it is quite an exception to find, on a certain question, Cassius, a member of the Sabinian school, following the opinion of Labeo; while Proculus, who gave his name to Labeo's school, preferred the opinion of Ofilius, the teacher of Capito, 3 § 140; Gaius too, who was a Sabinian, sometimes inclines to the opinion of the rival school; cf. 3, § 98. Controversies between the two schools are referred to by Gaius in the following passages of his Institutes: 1, 196; 2, 15, 37, 79, 123, 195, 200, 216–222, 231, 244; 3, 87, 98, 103, 141, 167–8, 177–8; 4, 78–9, 114, 170.

As long as these schools of law, which may have derived their constitution from the Greek schools of philosophy, existed, the office of President appears to have devolved by succession from one jurist to another. (For an account of this subject and references to the chief modern writers who have discussed it see Sohm, pp. 98, &c.)

We may briefly mention some of the most illustrious jurists who flourished somewhat later than Gaius. Aemilius Papinianus, who was probably a Syrian, lived in the time of Septimius Severus, and was murdered by the order of Caracalla: 601 extracts from his writings are contained in the Digest. It was perhaps to some extent due to the transcendent genius, or at least to the extraordinary reputation, of Papinian, which made him seem too great to be reckoned any man's follower, that we cease about his time to hear of opposing schools of jurisprudence. Papinian appears to have accompanied Severus to York, fulfilling the important function of praefectus praetorio, so that England may claim some slight connexion with the brightest luminary of Roman law.

A disciple and colleague of Papinian, of Syrian origin, who likewise became praefectus praetorio, was Domitius Ulpianus, murdered by the praetorian soldiery, whose domination he resisted, in the presence of the Emperor Alexander Severus: 2464 fragments, composing about a third of the whole Digest, are taken from his writings. An epitome of his Liber Singularis Regularum is still extant in a manuscript of the Vatican Library, and is the work referred to when, without mentioning the Digest, we cite the authority of Ulpian.

Another disciple and colleague of Papinian was Julius Paulus, of whose writings 2081 fragments are preserved in the Digest, forming about a sixth of its mass. An epitome of his treatise called Sententiae Receptae is found, with the Epitome of Gaius, in the code of Alaric II, king of the Visigoths; and it is to this book that we refer when we simply cite the authority of Paulus.

A disciple of Ulpian's was Herennius Modestinus, of whom 344 extracts are contained in the Digest. After Modestinus the lustre of Roman jurisprudence began to decline. (For a detailed account of the Roman jurists, see Roby's Introduction to the Digest, chs. vi–xvi.)

Besides the sources of law enumerated by Gaius, the Institutes of Justinian (1, 2, 9 and 10) mention Custom or Usage, the source of consuetudinary or customary law (jus non scriptum, consensu receptum, moribus introductum). To this branch of law are referred, with other rules, the invalidity of donations between husband and wife, Dig. 24, 1, 1, the power of a paterfamilias to make a will for his filiusfamilias who dies before the age of puberty (pupillaris substitutio), Dig. 28, 6, 2 pr., and universal succession in Coemption and Adrogation, 3 § 82. See also 4 §§ 26, 27. We may suppose that Customary law, like Roman law in general, would fall into two divisions, jus civile and jus gentium, the former embracing what Roman writers sometimes speak of as mores majorum. Before the time of Gaius, however, most of Customary law must have been incorporated by statute, as in early times by the law of the Twelve Tables, or taken up into the edict of the praetor or the writings of the jurists, Cic. De Invent. 2, 22, 67; i.e. unwritten law must have changed its character and have been transformed into written law.

[II. DE IVRIS DIVISIONE.]

§ 8. Omne autem ius quo utimur uel ad personas pertinet uel ad res uel ad actiones. *et* prius uideamus de personis.

Inst. 1, 2, 12: Gaius in Dig. 1, 5, 1.

ON THE BRANCHES OF THE LAW.

§ 8. The whole of the law by which we are governed relates either to persons, or to things, or to actions; and let us first examine the law of persons.

§ 8. What are the leading divisions of law—what are the main

masses into which legislation naturally breaks itself—what are the joints and articulations which separate the whole code into various subordinate codes, like the different limbs and members of an organic whole—what is the import of the Gaian division, adopted perhaps from previous writers, into jus personarum, jus rerum, jus actionum, or rather, to adhere to the classical phrases, jus ad personas pertinens, jus ad res pertinens, jus ad actiones pertinens?

By jus ad actiones pertinens, to begin with the easier part of the problem, there is no doubt that the inventor of the division intended to designate the law of PROCEDURE as opposed to the law of rights; the adjective code, to use Bentham's phraseology, as opposed to the substantive code. There is as little doubt that in the Institutions of Gaius this design is not executed with precision, and that, instead of the law of procedure, the last portion of his treatise contains also to some extent the law of sanctioning rights, as opposed to the law of primary rights. (For the meaning of this distinction see Austin's Jurisprudence, bk. I.) Or perhaps we should say that the legislative provisions respecting Procedure have a double aspect: a purely formal aspect, so far as they give regularity and method to the enforcement of sanctioning rights; and a material aspect, so far as certain stages of procedure (e.g. litis contestatio and res judicata) operate like Dispositions or any other Titles to modify the substantive rights of the contending parties. Procedure, then, is treated of in these Institutions partly indeed in its formal character, but still more in its material character, i.e. so far as its incidents can be regarded as belonging to the substantive code.

It is more difficult to determine the principle of the other division, the relation of the law of Persons to the law of Things. They both deal with the rights and duties of persons in the ordinary modern acceptation of the word; why then, we may inquire, are certain rights and duties of persons separated from the rest and dealt with under the distinguishing category of jura personarum? It is not enough to say with Austin that the law of Things is the universal or general portion of the law, the law of Persons a particular and exceptional branch; that it is treated separately on account of no essential or characteristic difference, but merely because it is commodious to treat separately what is special and exceptional from what is general and universal. This answer furnishes no positive character of the law of Persons, but only the negative character of anomaly, i.e. of unlikeness to the larger portion of the law; but it would be difficult to show that the law of Persons is more exceptional, anomalous, eccentric, than the Civil dispositions as opposed to the Natural dispositions of the law of Things.

We must look to the details of the law of Persons, and observe

whether its dispositions have any common character as contrasted with the dispositions of the law of Things. The law of Persons, in other words, the law of Status, classifies men as slaves and free, as citizens (privileged) and aliens (unprivileged), as paterfamilias (superior) and filiusfamilias (dependent). The law of Things looks at men as playing the parts of contractors or of neighbouring proprietors; in other words, the law of Persons considers men as UNEQUALS, the law of Things considers them as EQUALS: the one may be defined as the law of relations of inequality, the other as the law of relations of equality.

It may induce us to believe that the law of unequal relations and the law of equal relations is a fundamental division of the general code, if we consider how essential are the ideas of equality and inequality to the fundamental conception of law. If we ventured on a Platonic myth, we might say that Zeus, wishing to confer the greatest possible gift on the human race, took the most opposite and uncombinable things in the universe, Equality and Inequality, and, welding them together indissolubly, called the product by the name of political society or positive law.

The assumption will hardly be controverted, that in the relations of subject to subject, Positive law, like Ethical law, recognizes, as an ideal at least, the identity of the just (lawful) with the equal. Inequality, however, is no less essentially involved in positive law. We have seen that there is no right and no duty by positive law without a legislator and sovereign to whom the person owing the duty is in subjection. On the one side weakness, on the other irresistible power. Positive rights and duties, then, imply both the relation of subject to subject and the relation of subject to sovereign or wielder of the sanction, in other words, both the relation of equal to equal and the relation of unequal to unequal. It is the more surprising that Austin should apparently have failed to seize with precision this conception of the law of Persons, as he makes the remark, in which the whole truth seems implicitly contained, that the bulk of the law of Persons composes the Public, Political, or Constitutional code (jus publicum). Political society or government essentially implies subordination. It implies, on the one hand, sovereign power reposing in various legislative bodies, distributed, delegated, and vested in various corporations, magistrates, judges, and other functionaries; on the other hand, private persons or subjects subordinate to the sovereign power and to its delegates and ministers. The different forms of government are so many forms of subordination, so many relations of superior and inferior, that is, so many relations of unequals. Public law, then, is a law of Status, and the law of Persons or law of Status in the private code is the

intrusion of a portion of the public code into the private code; or, in barbarous and semi-civilized legislations, the disfigurement of private law by the introduction of relations that properly belong to public law. For instance, the most salient institution of the ancient Roman law of Persons, the power of life and death over wife and child that vested in the father of the household, was the concession to a subject of an attribute that properly belongs to the sovereign or a public functionary. Another institution, slavery, placed one subject over another in the position of despotic sovereign. The relation of civis to peregrinus may be conjectured to have originally been that of patronus to cliens, that is to say, of political superior to political inferior.

Government or positive law has usually commenced in the invasion by the stronger of the (moral) rights of the weaker; but so necessary is inequality to equality, or subordination to co-ordination, that the (moral) crimes of ancient conquerors are regarded with less aversion by philosophic historians, as being the indispensable antecedents of subsequent civilization. The beginnings, then, of positive law have been universally the less legitimate form of inequality, inequality between subject and subject, leaving its traces in dispositions of the civil code: but the advance of civilization is the gradual elimination of inequality from the law, until little remains but that between magistrate and private person, or sovereign and subject. Modern society has advanced so far on the path of equalization, in the recognition of all men as equal before the law, that the distinctions of status, as they existed in the Roman law of persons, are almost obliterated from the private code. Slavery has vanished; parental and marital power are of the mildest form; civilized countries accord the same rights to cives and peregrini; guardians (tutores) in modern jurisprudence, as in the later period of Roman law, are considered as discharging a public function, and accordingly the relation of guardian and ward may be regarded as a portion of the public code.

Before we terminate our general remarks on the nature of status, it is necessary to distinguish from the law of Persons a department of law with which, in consequence of a verbal ambiguity, it is sometimes confounded. Blackstone deserves credit for having recognized Public law as part of the law of Persons; but he also included under the law of Persons that department of primary rights to which belong the right of free locomotion, the right of using the bodily organs, the right to health, the right to reputation, and other rights which perhaps more commonly emerge in the redress meted out for their violation, that is, in the corresponding sanctioning rights, the right of redress for bodily violence, for false imprisonment, for bodily

injury, for defamation, and the like. These, however, are not the special and exceptional rights of certain eminently privileged classes, but the ordinary rights of all the community, at least of all who live under the protection of the law; they belong to filiusfamilias as well as to paterfamilias, to peregrinus and latinus as well as to civis. The rights in question, that is to say, do not belong to the law of unequal rights, or the law of Persons, but to the law of equal rights, or the law of Things.

The anomalous institution of slavery, however, furnishes a ground for controverting this arrangement; for, as by this legalized iniquity of ancient law, the slave, living as he did, not so much under the protection as under the oppression of the law, was denuded of all legal rights, including those of which we speak, we cannot say that these rights belong to servus as well as to liber. The same, however, may be said of contract rights and rights of ownership, for the slave had neither part nor lot in these on his own account any more than in the right of a man to the use of his own limbs. In defining, therefore, jura rerum to be the equal rights of all, we must be understood to mean, of all who have any rights. Perhaps, indeed, instead of saying that jura rerum are the rights of men regarded as equal, it would be more exact to say, that while jus personarum regards exclusively the unequal capacities, that is, the unequal rights of persons, jus rerum treats of rights irrespectively both of the equality and the inequality of the persons in whom they are vested, leaving their equal or unequal distribution to be determined by jus personarum.

In order to mark the natural position of these rights in the civil code, I have avoided designating them, with Blackstone, by the name of Personal rights, a term which I am precluded from using by yet another reason. I have employed the terms Personal right and Real right to mark the antithesis of rights against a single debtor and rights against the universe. Now the rights in question are rights that imply a negative obligation incumbent on all the world, that is to say, in our sense of the words they are not Personal, but Real.

As contrasted with Acquired rights (Erworbene Rechte, jus quaesitum) they are called Birthrights or PRIMORDIAL rights (Urrechte), names which are open to objection, as they may seem to imply a superior dignity of these rights, or an independence, in contrast with other rights, of positive legislation, characters which the name is not intended to connote. For purposes of classification this branch of primary rights is of minor importance. Unlike Status, Dominion, Obligation, Primordial rights are not the ground of any primary division of the code. The actions founded on the

infraction of Primordial rights partly belong to the civil code of obligation arising from Tort (e.g. actio injuriarum), partly and principally to the criminal code. (On the different interpretations which have been put on this threefold division of Private Law cf. Moyle's Introduction to the Inst. Just.)

[III. DE CONDICIONE HOMINVM.]

§ 9. Et quidem summa diuisio de iure personarum haec est quod omnes homines aut liberi sunt aut serui.

§ 10. Rursus liberorum hominum alii ingenui sunt, alii libertini.

§ 11. Ingenui sunt qui liberi nati sunt; libertini qui ex iusta seruitute manumissi sunt.

§ 12. Rursus libertinorum ⟨*tria sunt genera; nam aut ciues Romani aut Latini aut dediticiorum*⟩ numero sunt, de quibus singulis dispiciamus; ac prius de dediticiis.

ON DIVERSITIES OF CONDITION.

§ 9. The first division of men by the law of persons is into freemen and slaves.

§ 10. Freemen are divided into freeborn and freedmen.

§ 11. The freeborn are free by birth; freedmen by manumission from legal slavery.

§ 12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order, and commence with freedmen assimilated to enemies surrendered at discretion.

§ 12. As Gaius has not marked very strongly the divisions of the present book, it may be worth while to consider what are the leading branches of the doctrine of Status. Status falls under three heads—liberty (libertas), citizenship (civitas), and domestic position (familia).

Under the first head, men are divided into free (liberi) and slaves (servi): the free, again, are either free by birth (ingenui) or by manumission (libertini). We have here, then, three classes to consider: ingenui, libertini, servi.

Under the second head men were originally divided into citizens (cives) and aliens (peregrini). The rights of citizens fall into two branches, political and civil, the former being electoral and legislative power (jus suffragii) and capacity for office (jus honorum); the latter relating to property (commercium) or to marriage (connubium). Aliens were of course devoid of the political portion of these rights (suffragium and honores); they were also devoid of proprietary and family rights as limited and protected by the jus civile (commercium and connubium), though they enjoyed corresponding rights under the jus gentium. At a subsequent period a third class were intercalated between cives and peregrini, namely, Latini, devoid of the political portion of the rights of citizenship, and

enjoying only a portion of the private rights of citizenship, commercium without connubium. Here also, then, we have three classes, cives, Latini, peregrini.

The powers of the head of a family came to be distinguished by the terms potestas, manus, mancipium: potestas, however, was either potestas dominica, power over his slaves, or potestas patria, power over his children, which, at the period when Roman law is known to us, were different in kind; so that the rights of paterfamilias were really fourfold. Manus or marital power placed the wife on the footing of filiafamilias, which was the same as that of filiusfamilias. Paterfamilias had a legal power of selling (mancipare) his children into bondage; and mancipium, which is also a word used to denote a slave, designated the status of a filiusfamilias who had been sold by his parent as a bondsman to another paterfamilias. In respect of his purchaser, such a bondsman was assimilated to a slave: in respect of the rest of the world, he was free and a citizen, though probably his political capacities were suspended as long as his bondage (mancipii causa) lasted, § 116*. As slaves are treated of under the head of libertas, and the status of the wife (manus) was not legally distinguishable from that of the son, we may say, that in respect of domestic dependence or independence (familia), as well as in respect of libertas and civitas, men are divided into three classes,—paterfamilias, filiusfamilias, and Qui in mancipio est; paterfamilias alone being independent (sui juris), the other two being dependent (alieni juris) in unequal degrees.

These different classes are not examined by Gaius with equal minuteness. Under the first head he principally examines the libertini: the classes under the second head, cives, Latini, peregrini, are only noticed indirectly, i. e. so far as they present a type for the classification of libertini; and the bulk of the first book of the Institutions is devoted to domestic relations.

In modern jurisprudence, Status having disappeared, the law of domestic relations—the relation of husband to wife, parent to child, guardian to ward—constitutes the whole of that of which formerly it was only a part, the law of Persons. It differs from the rest of the civil code in that, while the relations of Property and Obligation are artificial and accidental, the relations governed by the code of the Family are natural, and essential to the existence of the human race: so much so that the principal relations of the family extend to the rest of the animal world, and the portion of the code relating to them is called by Ulpian pre-eminently jus Naturale, Dig. 1, 1, 3, Inst. 1, 2 pr. Secondly, whereas every feature of Property and Obligation is the creation of political law, Domestic life is only partially governed by political law, which leaves the greater portion

of its rights and duties to be ruled by the less tangible dictates of the moral law.

The pure law of the Family, that is, when we exclude all consideration of Property and Obligation relating to property, is of very moderate compass: but with the pure code of the family it is convenient to aggregate what we may call with Savigny, Syst. § 57, the applied code of the Family, i.e. such of the laws of Property and Obligation as concern members of the family group—husband and wife, parent and child, guardian and ward. The main divisions then of the substantive code are Family law Pure and Applied; the law of Ownership; and the law of Obligation. If, in view of its importance, we separate from the law of Ownership the law of Rerum Universitates, confining the law of Ownership to the province of Res singulae, we may add to the three we have enumerated a fourth division, the law of Successions per universitatem. Sohm, § 29.

[IIII. DE DE*DI*TICIIS VEL LEGE AELIA SENTIA.]

§ 13. Lege itaque Aelia Sentia cauetur u*t* qui serui a dominis poenae nomine uincti s*i*nt, quibusue stigmata inscripta s*i*nt, deue quibus ob noxam quaestio tormentis habita *s*it et in ea noxa fuisse conuicti s*i*nt, qui*ue* *ut* ferro aut cum bestiis depugnarent traditi sint, inue ludum custodiamue con*i*ecti fuerint, et postea uel ab eo*dem* domino uel ab alio manumissi, eiusdem condic*i*onis liberi fi*a*nt, cuius condicionis sunt peregrini dediticii*i*.

FREEDMEN ASSIMILATED TO SURRENDERED FOES AND DISPOSITIONS OF THE LEX AELIA SENTIA.

§ 13. The law Aelia Sentia enacts that slaves who have been punished by their proprietors with chains, or have been branded, or have been examined with torture on a criminal charge, and have been convicted, or have been delivered to fight with men or beasts, or have been committed to a gladiatorial school or a public prison, if subsequently manumitted by the same or by another proprietor, shall acquire by manumission the status of enemies surrendered at discretion.

[V. DE PEREGRINIS DEDITICIIS.]

§ 14. Vocantur autem peregrini dediticii hi qui quondam aduersus populum Romanum armis susceptis pugnauerunt, deinde uicti se dediderunt.

CONCERNING SURRENDERED ENEMIES.

§ 14. Surrendered enemies are people who have taken up arms and fought against the people of Rome and having been defeated have surrendered.

§ 15. Huius ergo turpitudinis seruos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut ciues Romanos aut Latinos fieri

§ 15. Slaves tainted with this degree of criminality, by whatever mode they are manumitted and at whatever age, and notwithstanding the plenary dominion of their proprietor, never become

dicemus, sed omni modo dediticiorum numero constit*ui* intellegemus.

§ 16. Si uero in nulla tali turpitudine sit seruus, manumissum modo ciuem Romanum modo Latinum fieri dicemus.

§ 17. Nam in cuius person*a* tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est uindicta aut censu aut testamento, is ciuis Romanus fit; sin uero aliquid eorum deerit, Latinus erit.

citizens of Rome or Latins, but can only acquire the status of enemies who have surrendered.

§ 16. If the slave has not committed offences of so deep a dye, manumission sometimes makes him a citizen of Rome, sometimes a Latin.

§ 17. A slave in whose person these three conditions are united, thirty years of age, quiritary ownership of the manumitter, liberation by a civil and statutory mode of manumission, i. e. by the form of vindicta, by entry on the censor's register, by testamentary disposition, becomes a citizen of Rome: a slave who fails to satisfy any one of these conditions becomes only a Latin.

[*VI.* DE MANVMISSIONE VEL CAVSAE PROBATIONE.]

§ 18. Quod autem de aetate serui requiritur, lege Aelia Sentia introductum est. nam ea lex minores xxx annorum seruos non aliter uoluit manumissos ciues Romanos fieri, quam si uindicta, apud consilium iusta causa manumissionis adprobata, liberati fuerint.

§ 19. Iusta autem causa manumissionis est ueluti si quis filium filiamue aut fratrem sororemue naturalem, aut alumnum, aut pae*d*agogum, aut seruum procuratoris habendi gratia, aut ancillam matrimonii causa, apud consilium manumittat.

ON MANUMISSION AND PROOF OF ADEQUATE GROUNDS OF MANUMISSION.

§ 18. The requisition of a certain age of the slave was introduced by the lex Aelia Sentia, by the terms of which law, unless he is thirty years old, a slave cannot on manumission become a citizen of Rome, unless the mode of manumission is by the form of vindicta, preceded by proof of adequate motive before the council.

§ 19. There is an adequate motive of manumission if, for instance, a natural child or natural brother or sister or foster child of the manumitter's, or a teacher of the manumitter's child, or a male slave intended to be employed as an agent in business, or a female slave about to become the manumitter's wife, is presented to the council for manumission.

[*VII.* DE CONSILIO ADHIBENDO.]

§ 20. Consilium autem adhibetur in urbe Roma quidem

CONCERNING THE CONSTITUTION OF THE COUNCIL.

§ 20. The council is composed in the city of Rome of five sena-

quinque senatorum et quinque equitum Romanorum puberum; in prouinciis autem uiginti recuperatorum ciuium Romanorum, idque fit ultimo die conuentus; sed Romae certis diebus apud consilium manumittuntur. maiores uero triginta annorum serui semper manumitti solent, adeo ut uel in transitu manumittantur, ueluti cum praetor aut pro consule in balneum uel in theatrum eat.

tors and five Roman knights above the age of puberty: in the provinces of twenty recuperators, who must be Roman citizens, and who hold their session on the last day of the assize. At Rome the council holds its session on certain days appointed for the purpose. A slave above the age of thirty can be manumitted at any time, and even in the streets, when the praetor or pro-consul is on his way to the bath or theatre.

§ 21. Praeterea minor triginta annorum seruus [manumissus] potest ciuis Romanus fieri, si ab eo domino qui soluendo non erat, testamento eum liberum et heredem relictum ——————————

(24 *uersus in C legi nequeunt*) Ulp. 1, 14; Inst. 1, 6, 1; Epit. 1, 1, 2.

§ 21. Under the age of thirty a slave becomes by manumission a citizen of Rome, when his owner being insolvent leaves a will, in which he gives him his freedom and institutes him his heir (2 § 154), provided that no other heir accepts the succession.

§ 22. ——— homines Latini Iuniani appellantur; Latini ideo, quia adsimulati sunt Latinis coloniariis; Iuniani ideo, quia per legem Iuniam libertatem acceperunt, cum olim serui uiderentur esse.

§ 22. Slaves manumitted in writing, or in the presence of witnesses, or at a banquet, are called Latini Juniani: Latini because they are assimilated in status to Latin colonists (§ 131), Juniani because they owe their freedom to the lex Junia, before whose enactment they were slaves in the eye of the law.

§ 23. Non tamen illis permittit lex Iunia uel ipsis testamentum facere, uel ex testamento alieno capere, uel tutores testamento dari. Ulp. 20, 14.

§ 23. These freedmen, however, are not permitted by the lex Junia either to make a will or to take under the will of another, or to be appointed testamentary guardians.

§ 24. Quod autem diximus ex testamento eos capere non posse, ita intellegemus, ne quid directo hereditatis legatorumue nomine eos posse capere dicamus: alioquin per fideicommissum capere possunt.

§ 24. Their incapacity to take under a will must only be understood as an incapacity to take directly as heirs or legatees, not to take indirectly as beneficiaries of a trust.

§ 25. Hi uero qui dediticio-

§ 25. Freedmen classed with

rum numero sunt nullo modo ex testamento capere possunt, non magis quam quilibet peregrinus, *nec* ipsi testamentum facere possunt secundum id quod magis placuit.

surrendered enemies are incapable of taking under a will in any form, as are other aliens, and are incompetent to make a will according to the prevalent opinion.

§ 26. Pessima itaque libertas eorum est qui dediticiorum numero sunt; nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad ciuitatem Romanam datur.

§ 26. It is only the lowest grade of freedom, then, that is enjoyed by freedmen assimilated to surrendered aliens, nor does any statute, senatusconsult, or constitution open to them a way of obtaining Roman citizenship.

§ 27. Quin etiam in urbe Roma uel intra centesimum urbis Romae miliarium morari prohibentur; et si qui contra ea fecerint, ipsi bonaque eorum publice uenire iubentur ea condicione, ut ne in urbe Roma uel intra centesimum urbis Romae miliarium seruiant neue umquam manumittantur; et si manumissi fuerint, serui populi Romani esse iubentur. et haec ita lege Aelia Sentia *con*prehensa sunt.

§ 27. Further, they are forbidden to reside in the city of Rome or within the hundredth milestone from it; and if they disobey the prohibition, their persons and goods are directed to be sold on the condition that they shall be held in servitude beyond the hundredth milestone from the city, and shall be incapable of subsequent manumission, and, if manumitted, shall be the slaves of the Roman people: and these provisions are dispositions of the lex Aelia Sentia.

§ 14. Peregrini dediticii. Cf. Livy 1, 38; Theoph. 1, 5, 3.

§ 15. Pleno jure. Cf. § 54 and 2 § 41.

§ 17. The earliest forms of manumission depended on the fiction that the slave is a freeman. They therefore carry us back to a time when manumission was not legally recognized. Cf. Sohm, p. 174, n. 4, and p. 58, n. 4. Manumission was either a public or a private act. When manumission, besides freeing a slave from the dominion of his proprietor, converted him into a citizen of Rome, it was not a matter of merely private interest to be accomplished by the sole volition of the proprietor. Accordingly, the three modes of manumission which conferred Roman citizenship on the manumitted slave, vindicta, censu, testamento, involved in different forms the intervention of the State.

In manumission by Vindicta the State was represented by the praetor. The vindicta or festuca was a rod or staff, representing a lance, the symbol of dominion, with which the parties in a real action (vindicatio) touched the subject of litigation as they solemnly

pronounced their claim, 4 § 16. Accordingly it was used in a suit respecting freedom (liberalis causa), for this, as status is a real right (jus in rem), was a form of real action, and was sometimes prosecuted by way of genuine litigation, sometimes was merely a solemn grant of liberty, that is, a species of alienation by surrender in the presence of the magistrate (in jure cessio). In a liberalis causa the slave to be manumitted, being the subject of the fictitious litigation, could not himself be a party, but was advocated by a vindex or adsertor libertatis, who in later times was usually represented by the praetor's lictor. The adsertor grasping the slave with one of his hands, and touching him with the vindicta, asserted his freedom. The proprietor quitting his grasp of the slave (manu mittens) and confessing by silence or express declaration the justice of the claim, the magistrate pronounced the slave to be free. This procedure, which came to be much curtailed, belonging to the praetor's voluntary, not his contentious, jurisdiction, did not require the praetor to be seated on his elevated platform in the comitium (pro tribunali), but might be transacted by him on the level ground (de plano); and as the mere presence of the praetor constituted a court (jus), he was usually seized upon for the purpose of manumissions as he was preparing to take a drive (gestatio), or to bathe, or to go to the theatre, § 20 (for the different accounts given of this mode of manumission see Roby, Private Law, 1, p. 26, n. 1).

In manumission by the Census the interests of the State were represented by the censor. Censu manumittebantur olim qui lustrali censu Romae jussu dominorum inter cives Romanos censum profitebantur, Ulpian, 1, 8. 'Registry by the censor was an ancient mode of manumission by the quinquennial census at Rome when a slave at his master's order declared his right to make his return of property (professio) on the register of Roman citizens.' Ex jure civili potest esse contentio, quum quaeritur, is qui domini voluntate census sit, continuone an ubi lustrum conditum liber sit, Cic. De Orat. 1, 40. 'It is a question of civil law, when a slave is registered with his owner's sanction, whether his freedom dates from the actual inscription on the register or from the close of the censorial period.' The census was a republican institution, which had been long obsolete when Gaius wrote. Ulpian, l. c., speaks of it as a thing of the past. Since the Christian era only three had been held, the last under Vespasian, A. D. 74.

Wills were originally executed at the Comitia calata, 2 § 101, where the dispositions of the testator, including his donations of freedom, received legislative sanction, being converted into a private law by the ratification of the sovereign assembly. When a new

form of will was introduced, 2 § 102, testators retained their power of manumission, although the people here at the utmost were only symbolically represented by the witnesses of a mancipation. Bequests of liberty were either direct or indirect. A direct bequest of liberty (directo data libertas) made the manumitted slave a freedman of the testator (libertus orcinus, Inst. 2, 24, 2): an indirect bequest, that is, a request to the heir to manumit the slave (fideicommissaria libertas), made the slave on manumission a freedman of the heir, 2 § 266.

§ 18. The lex Aelia Sentia passed in the reign of Augustus, A.D. 4, and named after the consuls Sextus Aelius Catus and Caius Sentius Saturninus, was intended to throw obstacles in the way of acquiring Roman citizenship (Sueton. Aug. 40). One of its enactments provided that a slave under the age of thirty could not be made a citizen unless manumitted by vindicta, after proof of adequate motive before a certain judicial board. We may inquire what would be the effect of manumission if the causae probatio were omitted. Inscription on the censor's register, if in use, would probably have been null and void, as this ceremony was either a mode of making a Roman citizen or it was nothing. Testamentary manumission, as we learn from Ulpian, 1, 12, left the man legally a slave, but gave him actual liberty (possessio libertatis, in libertate esse, as opposed to libertas), a condition recognized and protected by the praetor. Manumission by vindicta left him still a slave (according to the MS. of Ulpian, ib. the slave of Caesar). Either the lex Aelia Sentia or lex Junia, it is uncertain which (cf. §§ 29, 31; Ulpian, l. c.), apparently provided that, in the absence of causae probatio, the minor triginta annis manumissus should belong to the new class which it introduced, namely, the Latini.

§ 19. Alumnus denotes a slave child reared by the manumitter, as appears from the following passage: Alumnos magis mulieribus conveniens est manumittere, sed et in viris receptum est, satisque est permitti eum manumitti in quo nutriendo propensiorem animum fecerint, Dig. 40, 2, 14 pr. 'Foster children are more naturally manumitted by women than by men, though not exclusively; and it suffices to allow the manumission of a child who has won his master's affection in the course of his education.' (For the custom derived from Greece of employing slaves as paedagogi in Roman households see Smith's Dict. of Greek and Roman Antiq. s. v.)

§ 20. The Equites Romani, who at Rome composed a moiety of the council mentioned in the text, were either Equites or Equites equo publico (for the title eques Romanus equo publico, which appears in inscriptions, see Wilmann's Index Inscriptionum, 2178, 2182; cf. Greenidge, Infamia, p. 88). Eques was such merely by his census:

Eques equo publico was a youth nominated by the emperor to the turmae equitum ; not, however, intended for actual service with the legions, but merely marked out as an expectant of future employment in higher public functions, military or civil. The title of Princeps juventutis, often conferred by the emperors on their successors designate, denoted the leader of the Equites equo publico. This distinction of classes among Equites lasted down to the time of Hadrian, and perhaps later. In the time of Augustus, and subsequently, the list of judices (album judicum) was, according to Mommsen (Staatsr. 3, p. 535), taken simply from the Equites equo publico, the Senatores being no longer a decuria. Augustus added a new decuria, the Ducenarii, those whose census amounted to 200,000 sesterces, who judged minor cases; and subsequently Caligula added a fifth (cf. Greenidge's Roman Public Life).

Recuperators are judges not taken from the panel (album judicum); see Greenidge's Legal Procedure of Cicero's Time, p. 266.

§ 21. Ulpian says, 1, 14, that a slave either under thirty years of age, or one who otherwise would only have become dediticius, or a freedman of the lowest class, if he is instituted the heres necessarius of an insolvent, becomes civis Romanus; cf. 2 § 154. Mommsen would supplement the text in this section with the following words—'relictum alius heres nullus excludit neque ullus alius ex eo testamento heres existat idque eadem lege cautum est.' In respect of what is missing in the remainder of the lacuna cf. note to Huschke's Gaius.

When manumission was a purely private act, it could not confer Roman citizenship; it could only make a dediticius or a latinus.

The codex Alaricianus or Breviarium Alaricianum, a code promulgated A.D. 506 by Alaric II, king of the Visigoths of Spain and Gaul, contained, besides extracts from the codex Theodosianus (promulgated A.D. 438), a selection from the Sententiae of Paulus and an epitome of these Institutes of Gaius. From this epitome it appears that in the paragraphs now obliterated Gaius proceeded to explain the modes of private manumission by which a slave became Latinus Junianus, and instanced writing (per epistolam), attestation of witnesses (inter amicos), invitation of the slave to sit with other guests at the table of his master (convivii adhibitione).

§ 22. The lex Junia, as this law is called by Gaius and Ulpian (3, 3), or lex Junia Norbana, the title given to it by Justinian (Inst. 1, 5, 3), may be regarded as of uncertain date; the common opinion based on the word Norbana has been that it was passed in the reign of Tiberius, A.D. 19, fifteen years after the lex Aelia Sentia in the consulate of Marcus Junius Silanus and Lucius Norbanus Balbus, but it is now thought by some well-known

writers to be earlier than the lex Aelia Sentia; thus Mommsen (Staatsr. 3, 626) is inclined to put it back to the end of the free republic (cf. Schneider, Zeitschr. d. Sav. Stiftung v. R. A. 1884). It defined and modified the status conferred by such acts of private manumission as were probably mentioned in this paragraph, converting Praetoris tuitione liber into ipso jure liber, or possessio libertatis into genuine libertas; with, however, sundry grievous stints and deductions. Under this statute the freedman was nominally assimilated to Latinus coloniarius, the citizen of a Roman colony in Latium; that is, had a moiety of the private rights composing civitas Romana or jus Quiritium, possessing commercium without connubium. As incapable of connubium or civil marriage, the Latinus was incapable of patria potestas over his children and of agnatio or civil relationship. Though incapable of civil marriage he was of course capable of gentile marriage (matrimonium, uxorem liberorum quaerendorum causa ducere) and of natural relationship (cognatio), just as an alien (peregrinus), though, by want of commercium, incapable of dominion ex jure Quiritium, was capable of bonitary ownership (in bonis habere) under the jus gentium.

In virtue of commercium, the Latinus Junianus was capable of Quiritary ownership, of civil acquisition and alienation (usucapio, mancipatio, in jure cessio), contract (obligatio), and action (vindicatio, condictio), like a Roman citizen; but in respect of testamentary succession his rights were very limited. He was said to have testamentary capacity (testamenti factio), Ulpian, 20, 8; but this only meant that he could perform the part of witness, or familiae emptor, or libripens (2 § 104), i.e. could assist another person to make a valid will; not that he could take under a will either as heir or as legatee, or could dispose of his own property by will, Ulpian, 20, 14. At his death all his property belonged to his patron, as if it were the peculium of a slave, 3 § 56. In fact, as Justinian says: Licet ut liberi vitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amittebant, Inst. 3, 7, 4. 'Though free in their lifetime, the same moment that deprived them of life reduced them to the condition of slaves.'

Although in the person of libertus himself, Latinitas retained many traces of its servile origin, yet it was not so for his posterity; these disabilities only attached to the original freedman, not to his issue. The son of the dediticius or Latinus Junianus, though reduced to absolute penury by the confiscation of the parental property to the patron, began, and continued, the world with the ordinary capacities, respectively, of peregrinus and Latinus coloniarius, and was under no legal obligations to the patron of his father.

Long before the time of Gaius, Latinitas or Latium had only a juristic, not an ethnographic signification. Cf. § 79. Soon after the Social War (B.C. 91) all Italy received the civitas Romana. Originally Gallia Cispadana (Southern Lombardy) had civitas Romana, while Gallia Transpadana (Northern Lombardy) had only Latinitas, but Gallia Transpadana afterwards obtained civitas. Latinitas was a definite juristic conception, and Latin status was conferred as a boon on many provincial towns and districts that had no connexion with Latium or its races. Vitellius is carped at by Tacitus for his lavish grants of Latinity (Latium vulgo dilargiri, Hist. 3, 55). Hadrian made many similar grants (Latium multis civitatibus dedit, Spartian, Had. 21), and Vespasian conferred Latin rights on the whole of Spain, Pliny, Hist. Nat. 3, 4. See § 131 Comm.

[*QVIBVS MODIS* LATINI AD CIVITATEM ROMANAM PERVENIANT.]

§ 28. Latini uero multis modis ad ciuitatem Romanam perueniunt.

§ 29. Statim enim ex lege Aelia Senti*a* minores triginta annorum manumissi et Latini facti si uxores duxerint uel ciues Romanas uel Latinas coloniarias uel eiusdem condicionis, cuius e*t* ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus ciuibus Romanis puberibus, et filium procreauerint, cum is filius anniculus esse coeperit, datur eis potestas per eam legem adire praetorem uel in prouinciis praesidem prouinciae, et adprobare se ex lege Aelia Sentia uxorem duxisse et ex ea filium anniculum habere; et si is apud quem causa probata est id ita esse pronuntiauerit, tunc et ipse Latinus et uxor eius, si et ipsa ⟨*eiusdem condicionis sit, et filius, si et ipse*⟩ eiusdem condicionis sit, ciues Romani esse iubentur.

Ulp. 3, 3.

MODES BY WHICH LATIN FREEDMEN BECOME ROMAN CITIZENS.

§ 28. Latins have many avenues to the Roman citizenship.

§ 29. For instance, the lex Aelia Sentia enacts that when a slave below the age of thirty becomes by manumission a Latin, if he take to himself as wife a citizen of Rome, or a Latin colonist, or a freedwoman of his own condition, and thereof procure attestation by not less than seven witnesses, citizens of Rome above the age of puberty, and begets a son, on the latter attaining the age of a year, he is entitled to apply to the praetor, or, if he reside in a province, to the president of the province, and to prove that he has married a wife in accordance with the lex Aelia Sentia, and has had by her a son who has completed the first year of his age: and thereupon if the magistrate to whom the proof is submitted pronounce the truth of the declaration, that Latin and his wife, if she is of the same condition, and their son, if he is of the same condition, are declared by the statute to be Roman citizens.

§ 30. Ideo autem in *huius persona* adiecimus 'si et ipse eiusdem condicionis sit,' quia si uxor Latini ciuis Romana est, qui ex ea nascitur, ex nouo senatusconsulto, quod auctore diuo Hadriano factum est, ciuis Romanus nascitur.

Cf. § 80; Ulp. l. c.

§ 30. The reason why I added, when I mentioned the son, if of the same condition, was this, that if the wife of the Latin is a citizen of Rome, the son, in virtue of the recent senatusconsult made on the motion of the late Emperor Hadrian, is a citizen of Rome from the date of his birth.

§ 31. Hoc tamen ius adipiscendae ciuitatis Romanae etiamsi so*l*i minores triginta annorum manumissi et Latini facti ex lege Aelia Sentia habuerunt, tamen postea senatusconsulto, quod Pegaso et Pusione consulibus factum est, etiam maioribus triginta annorum manumissis Latinis factis concessum est.

§ 31. This capacity of acquiring Roman citizenship, though by the lex Aelia Sentia exclusively granted to those under thirty years of age who had become Latins by this statute, by a subsequent senatusconsult, made in the consulship of Pegasus and Pusio, was extended to all freedmen who acquire the status of Latins, even though thirty years old when manumitted.

§ 32. Ceterum etiamsi ante decesserit Latinus, quam anniculi filii causam proba*ue*rit, potest mater eius causam probare, et sic et ipsa fiet ciuis Romana, si Latina fuerit ——| — permissum ————|—*q*uibusdam ————| ipse filius ciuis Romanus sit, quia ex ciue Romana matre natus est, tamen debet causam probare ut suus heres patri fiat.

§ 32. If the Latin die before proof of his son's attaining the age of a year the mother may prove his condition, and thereupon both she and her son, if she be a Latin, become citizens of Rome. And if the mother fails to prove it, the tutors of the son may do so or the son himself when he has attained the age of puberty. If the son himself is a Roman citizen owing to the fact of his having been born of a Roman citizen mother, he must nevertheless prove his condition in order to make himself his father's self successor.

§ 32 *a*. ⟨*quae*⟩ uero diximus de filio annicul⟨o, *eadem et de filia annicula*⟩ dicta intellegemus.

§ 32 *a*. What has been said about a son of a year old, must be understood to be equally applicable to a daughter of that age.

§ 32 *b*. |————|————| id est fiunt ciues Romani, si Romae inter uigiles sex annis militauerint. postea dicitur factum esse senatusconsultum, quo data est illis ciuitas

§ 32 *b*. By the Visellian statute those either under or over thirty years of age, who when manumitted become Latins, acquire the jus quiritium, i. e. become Roman citizens, if they have served for six years in the guards at Rome.

Romana, si triennium militiae expleuerint. Ulp. 3, 5.

A subsequent senatusconsultum is said to have been passed, by which Roman citizenship was conferred on Latins, who completed three years' active military service.

§ 32 *c*. Item edicto Claudii Latini ius Quiritium consecuntur, si nauem marinam aedificauerint, quae non minus quam decem milia modior*um frumen*ti capi*at*, eaque nauis uel quae in eius locum substitut*a sit sex* annis frumentum Romam portauerit. Ulp. 3, 6.

§ 32 *c*. Similarly by an edict of Claudius Latins acquire the right of citizenship, if they build a ship which holds 10,000 modii of corn, and this ship or one substituted for it imports corn to Rome for six years.

§ 33. Praeterea *a Ner*one *constitutum est* ut si Latinus qui patrimoni*um* sestertium CC milium plurisue habebit in urbe Roma dom*um* aedificauerit, in qu*am* non minus quam partem dimidia*m* patrimonii sui inpenderit, ius Quiritium consequatur. Tac. Ann. 15, 43; Ulp. 3, 1.

§ 33. Nero further enacted that if a Latin having property worth 200,000 sesterces or more, build a house at Rome on which he expends not less than half his property, he shall acquire the right of citizenship.

§ 34. Denique Traianus constituit ut si *Latinus* in urbe tri*en*nio pistrinum exercuerit, *in quo in* dies singulos non minus quam centenos m*odios* frument*i pin*seret, ad ius Quiritium peruen*iat*. Ulp. l. c.

§ 34. Lastly, Trajan enacted that if a Latin carry on the business of miller in Rome for three years, and grinds each day not less than a hundred measures of wheat, he shall attain Roman citizenship.

§ 35. ———|———|———| sequi ———| maiores triginta annorum manumissi et Latini facti ———|——— ius Quiritium consequi ——— *tri*|ginta annorum manumittant ———| ———| manumissus uindicta aut censu aut testamento ——— *ci*uis Romanus |——— libertus fit q*ui e*um iterauerit. ergo si seruus i*n* | bonis tuis, ex iure Quiritium meus erit, Latinus quidem a te solo fieri potest, iterari autem a me, non etiam a te potest, et eo modo meus libertus fit. s*ed* et ceteris modis

§ 35. Slaves who become Latins either because they are under thirty at the time of their manumission, or having attained that age because they are informally manumitted, may acquire Roman citizenship by re-manumission in one of the three legal forms, and they are thereby made freedmen of their re-manumitter. If a slave is the bonitary property of one person and the quiritary property of another he can be made a Latin by his bonitary owner, but his re-manumission must be the act of his quiritary owner, and even if he acquires citizenship in other

ius Quiritium consecutus meus libertus fit. bonorum autem quae———, *cum* is morietur, reliquerit tibi possessio datur, quocumque modo ius Quiritium fuerit consecutus. quodsi cui*us* et in bonis et ex iure Quiritium sit manumissus, ab eodem scilicet et Latinus fieri potest et ius Quiritium consequi.

Ulp. 3, 1–4.

ways he becomes the freedman of his quiritary owner. The praetor, however, invariably gives the bonitary owner possession of the inheritance of such freedman. A slave in whom his owner has both bonitary and quiritary property, if twice manumitted by his owner, may acquire by the first manumission the Latin status, and by the second Roman citizenship.

§ 29. This enactment is stated by Ulpian to belong to the lex Junia (Ulp. 3, 3), cf. § 18, comm.

Pronuntiaverit. The decision (sententia) of the judex in a judicium ordinarium was either condemnatio or absolutio of the defendant. In actions in which the case was left to the arbitrium of a judex this was apparently preceded by pronuntiatio, a declaration of the rights of the parties. This appears from the following, among other passages: Sed et si fundum vindicem meum esse, tuque confessus sis, perinde teneberis atque si dominii mei fundum esse pronuntiatum esset, Dig. 42, 2, 6, 2. Si quum de hereditate inter me et te controversia esset, juravero hereditatem meam esse, id consequi debeo quod haberem si secundum me de hereditate pronuntiatum esset, Dig. 12, 2, 10, 3. When the pronuntiatio was for the plaintiff, if the defendant obeyed the arbitrium or provisional order of the judex by making restitution, there was no subsequent condemnatio. Cf. 4 § 49. In the form of real action, called a praejudicium, that is, a preliminary issue of fact, the pronuntiatio formed the whole result of the trial, and was not followed by sententia. Similarly, when a Latinus laid his claim of Roman citizenship before the praetor under this enactment of the lex Aelia Sentia, the result of the extraordinaria cognitio of the praetor was merely a pronuntiatio without any subsequent decretum.

§ 31. Pegasus and Pusius were consuls in the reign of Vespasian. Inst. 2, 23, 5.

§ 32 *b*–§ 35. For references to the Visellian law cf. Cod. 9, 21 and 31. It was probably passed A. D. 24, when Serv. Cornelius Cethegus and L. Visellius Varro were consuls (but see Mommsen, Staatsr. 3, 424). Besides the method provided by the lex Aelia Sentia, and by the Senatusconsultum mentioned in § 31, Latinus or Latina might attain the Roman citizenship under the following conditions:—

1. By erroris causae probatio, i.e. if Latinus marry Peregrina, believing her to be Latina or Civis, § 70; or Latina marry Pere-

grinus, believing him to be Latinus, § 69; or if Civis, believing himself to be Latinus or Peregrinus, marry Latina, § 71; or if Civis marry Peregrinus, believing him to be Civis or Latinus; or if Civis marry Latina or Peregrina, believing her to be Civis Romana, § 67; on birth of a child and on proof of this mistake, the Latinus or Latina and their offspring acquire the citizenship.

2. By magistracy in a Latin colony Latinus becomes Civis Romanus, §§ 95, 96.

3. By re-manumission (iteratio), i.e. on slaves under thirty when manumitted acquiring Latinity by one of the private modes of manumission, a subsequent manumission by one of the public modes, vindicta, censu, or testamento, converted them from Latini into Cives, § 35, and Ulp. 3, 4.

4. Under the lex Visellia above mentioned by six years' service in the Roman guards (si inter vigiles Romae sex annos militaverit, Ulp. 3, 5). A decree of the senate made three years' service a sufficient title, § 32 *b*. Compare the provision of 13 Geo. II, c. 3, whereby every foreign seaman who in time of war serves two years on board an English ship, and all foreign protestants serving two years in a military capacity in the American colonies, are naturalized.

5. Under a constitution of Nero by building a house in Rome (aedificio, Ulp. 3, 1), § 33.

6. Under an edict of Claudius by building a ship of 10,000 modii and importing corn to Rome for six years, § 32 *c*, Sueton. Claud., Ulp. 3, 6. Compare the English law by which all foreign protestants employed three years in the whale fishery are naturalized, except as to capacity for public office.

7. Under a constitution of Trajan by building a mill and bakehouse for the supply of Rome (pistrino, Ulp. 3, 1), § 34.

8. By bearing three children, Ulp. 3, 1.

9. By imperial grant (beneficio principali, Ulp. 3, 2). This and the previous mode of acquiring citizenship were perhaps mentioned by Gaius at the beginning of § 35.

Civitas Romana and Jus Quiritium are synonymous, but the former term was always used when citizenship was conferred on a Peregrinus, the latter generally when it was conferred on Latinus Junianus: e.g. Quare rogo, des ei civitatem, est enim peregrinae conditionis, manumissus a peregrina. . . . Idem rogo, des ius Quiritium libertis Antoniae Maximillae . . . quod a te, petente patrona, peto, Pliny to Trajan, 10, 4. Ago gratias, domine, quod et ius Quiritium libertis necessariae mihi feminae et civitatem Romanam Harpocrati, iatraliptae meo, sine mora indulsisti, ibid. 10, 5. Civitas Romana, however, was sometimes used in speaking of the enfranchisement of Latinus, as we see from § 28.

§ 36. | *Non tamen cuicumque uolenti manumittere licet.* Inst. 1, 6 pr.

§ 36. Not every owner who is so disposed is permitted to manumit.

§ 37. *Nam is qui* | in fraudem creditorum uel in fraudem patroni manumittit, nihil agit, quia lex Aelia Sentia inpedit libertatem. Inst. l. c., Ulp. 1, 15.

§ 37. An owner who would defraud his creditors or his own patron by an intended manumission, attempts in vain to manumit, because the lex Aelia Sentia prevents the manumission.

§ 38. It*em* eadem lege minori xx annorum domino non aliter manumittere permittitur, quam [si] uindicta apud consilium iusta causa manumissionis adprobata [fuerit]. Inst. 1, 6, 4.

§ 38. Again, by a disposition of the same statute, before attaining twenty years of age, the only process by which an owner can manumit is fictitious vindication, preceded by proof of adequate motive before the council.

§ 39. Iustae autem causae manumissionis sunt ueluti si quis patrem aut matrem aut paedagogum aut conlactaneum manumittat. sed et illae causae, quas superius in seruo minore xxx annorum exposuimus, ad hunc quoque casum de quo loquimur adferri possunt. item ex diuerso hae causae, quas in minore xx annorum domino rettulimus, porrigi possunt et ad seruum minor*em* xxx annorum. Inst. 1, 6, 4, 5.

§ 39. It is an adequate motive of manumission, if the father, for instance, or mother or teacher or foster-brother of the manumitter, is the slave to be manumitted. In addition to these, the motives recently specified respecting the slave under thirty years of age may be alleged when the manumitting owner is under twenty; and, reciprocally, the motives valid when the manumitting owner is under twenty are admissible when the manumitted slave is under thirty.

§ 40. Cum ergo certus modus manumittendi minoribus xx annorum dominis per legem Aeliam Sentiam constitutus sit, euenit ut qui xiiii annos aetatis expleuerit, licet testamentum facere possit et in eo herede*m* sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annorum xx, libertatem seruo dare non po*ssit*. Inst. 1, 6, 7.

§ 40. As, then, the lex Aelia Sentia imposes a certain restriction on manumission for owners under the age of twenty, it follows that, though a person who has completed his fourteenth year is competent to make a will, and therein to institute an heir and leave bequests; yet, if he has not attained the age of twenty, he cannot therein enfranchise a slave.

§ 41. Et quamuis Latinum facere uelit minor xx annorum dominus, tamen nihilo minus

§ 41. And even to confer the Latin status, if he is under the age of twenty, the owner must

debet apud consilium causam probare et ita postea inter amicos manumittere.

satisfy the council of the adequacy of his motive before he manumits the slave in the presence of witnesses.

§ 41. Justinian, having first reduced the age from 20 to 17, or the beginning of the eighteenth year (Inst. 1, 6, 7), finally permitted minors to enfranchise by will as soon as they could make a valid will, i.e. at the age of 14 (Novella, 119, 2). He mentions that the lowest class of freedmen (dediticia libertas) had long been obsolete, and formally abolished the second class (latina libertas), converting informal modes of making Latinus, such as per epistolam, inter amicos, into modes of making Civis Romanus, and declaring the rest inoperative, Cod. 7, 6. Cf. Moyle, Comm. Inst. 1, 5.

DE LEGE FVFIA CANINIA.

§ 42. Praeterea lege Fufia Caninia certus modus constitutus est in seruis testamento manumittendis. Inst. 1, 7, 1.

§ 42. Moreover, by the lex Fufia Caninia a certain limit is fixed to the number of slaves who can receive testamentary manumission.

§ 43. Nam ei qui plures quam duos neque plures quam decem seruos habebit usque ad partem dimidiam eius numeri manumittere permittitur; *e*i uero, qui plures quam x neque plures quam xxx seruos habebit usque ad tertiam partem eius n*u*meri manumittere permittitur. at ei qui plures quam xxx neque plures quam centum habebit usque ad partem quartam potestas manumittendi *d*atur. nouissime ei qui plures quam c nec plures quam D habebit, non plures *m*anumittere permittitur qua*m* quintam partem; neque plures ⟨———⟩ *t*ur: sed p*rae*scribit lex, ne cui plures manumittere liceat quam *c*. quodsi quis unum seruum omnino *a*ut duos habet, ad hanc legem non pertinet et ideo libera*m* habet potestatem manumittendi.

§ 43. An owner who has more than two slaves and not more than ten is allowed to manumit as many as half that number; he who was more than ten and not more than thirty is allowed to manumit a third of that number; he who has more than thirty and not more than a hundred is allowed to manumit a fourth; lastly, he who has more than a hundred and not more than five hundred is allowed to manumit a fifth: and, however many a man possesses, he is never allowed to manumit more than this number, for the law prescribes that no one shall manumit more than a hundred. On the other hand, if a man has only one or only two, the law is not applicable, and the owner has unrestricted power of manumission.

§ 44. Ac ne ad eos quidem omnino haec lex pertinet qui sine testam*ento* manumittun*t*. itaque licet iis, qui uindicta aut censu aut inter amicos manumittunt, totam familiam liberare, scilicet si alia causa non inpediat libertatem.

§ 44. Nor does the statute apply to any but testamentary manumission, so that by the form of vindicta or inscription on the censor's register, or by attestation of friends, a proprietor of slaves may manumit his whole household, provided that there is no other let or hindrance to impede their manumission.

§ 46. Nam et si *testamento* scriptis in orbem seruis libertas data sit, quia nullus ordo manumissionis inuenitur, nulli liberi erunt, quia lex Fufia Caninia quae in fraudem eius facta sint rescindit. sunt etiam specialia senatusconsulta, quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt.

§ 46. If a testator manumits in excess of the permitted number, and arranges their names in a circle, as no order of manumission can be discovered, none of them can obtain their freedom, as both the lex Fufia Caninia itself and certain subsequent decrees of the senate declare null and void all dispositions contrived for the purpose of eluding the statute.

§ 47. In summa sciendum est, ⟨*cum*⟩ lege Aelia Sentia cautum sit, *ut* creditorum fraudandorum causa manumissi liberi non fiant, *hoc etiam* ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani), cetera uero iura eius legis ad peregrinos non pertinere.

§ 47. Finally, it is to be noted that the provision in the lex Aelia Sentia making manumissions in fraud of creditors inoperative, was extended to aliens by a decree of the senate passed on the proposition of the Emperor Hadrian; whereas the remaining dispositions of that statute are inapplicable to aliens.

§ 47. The lex Fufia Caninia, passed under Augustus (Sueton. Aug. 40), to prevent the degradation of citizenship by testators abusing their testamentary right of manumission, was generally called the lex Furia Caninia before the manuscript of Gaius was re-examined by Studemund; it was abrogated by Justinian. See Inst. 1, 7. The clause of the lex Aelia Sentia referred to in the text was retained by Justinian. Inst. 1, 6 pr.

DE HIS QVI SVI VEL ALIENI IVRIS SINT.

§ 48. Sequitur de iure personarum alia diuisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt. Inst. 1, 8 pr.

§ 48. Another division in the law of Persons classifies men as either dependent or independent.

§ 49. Rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt. Inst. l. c.

§ 49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation.

§ 50. Videamus n*unc* de his quae alieno iuri subiect*ae* sint; ⟨*nam*⟩ si cognouerimus quae *i*stae personae s*i*nt, simul intellegemus quae sui iuris sint. Inst. l. c.

§ 50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

§ 51. Ac prius dispiciamus de iis qui in aliena potestate sunt. Inst. l. c.

§ 51. Of persons subject to a superior, let us first examine who are in his power.

§ 52. In potestate itaque sunt serui dominorum. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes anim*a*duertere possumus dominis in seruos uitae necisque potestatem esse; et quo*d*cumque per seruum adquiritur, id domino adquiritur. Inst. 1, 8, 1.

§ 52. Slaves are in the power of their proprietors, a power recognized by jus gentium, since all nations present the spectacle of masters invested with power of life and death over slaves; and (by the Roman law) the owner acquires everything acquired by the slave.

§ 53. Sed hoc tempore neque ciuibus Romanis, nec ullis aliis hominibus qui sub imperio populi Romani sunt, licet supra modum et sine causa in seruos suos saeuire; nam ex constitution*e* imperatoris Antonini qui sine causa seruum suum occiderit, non minus teneri iubetur, quam qui alienum seruum occiderit. sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur; nam consultus a quibusdam p*rae*sidibus prouinciarum de his seruis, qui ad fana deorum uel ad statuas principum confugiunt, praecepit ut si intolerabilis uideatur dominorum saeuitia cogantur seruos suos uendere. et utrumque recte fit; *m*ale enim nostro iure uti non debemus; qua

§ 53. But in the present day neither Roman citizens, nor any other persons under the empire of the Roman people, are permitted to indulge in excessive or causeless harshness towards their slaves. By a constitution of the Emperor Antoninus, a man who kills a slave of whom he is owner, is as liable to punishment as a man who kills a slave of whom he is not owner: and inordinate cruelty on the part of owners is checked by another constitution whereby the same emperor, in answer to inquiries from presidents of provinces concerning slaves who take refuge at temples of the gods, or statues of the emperor, commanded that on proof of intolerable cruelty a proprietor should be compelled to sell his slaves: and both ordinances are just, for we ought not

ratione et prodigis interdicitur bonorum suorum administratio. Inst. 1, 8, 2.

to make a bad use of our lawful rights, a principle recognized in the interdiction of prodigals from the administration of their fortune.

§ 54. Ceterum cum apud ciues Romanos duplex sit dominium (nam uel in bonis uel ex iure Quiritium uel ex utroque iure cuiusque seruus esse intellegitur), ita demum seruum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit; nam qui nudum ius Quiritium in seruo habet, is potestatem habere non intellegitur.

§ 54. But as citizens of Rome may have a double kind of dominion, either bonitary or quiritary, or a union of both bonitary and quiritary dominion, a slave is in the power of an owner who has bonitary dominion over him, even unaccompanied with quiritary dominion; if an owner has only bare quiritary dominion he is not deemed to have the slave in his power.

§§ 52, 53. The condition of the slave was at its worst in the golden period of Roman history. As soon as Rome found her power irresistible she proceeded to conquer the world, and each stage of conquest was the reduction of a vast portion of mankind to slavery. 30,000 Tarentines were sent as slaves to Rome by Fabius Cunctator, the captor of Tarentum; 150,000 Epirots by Paulus Aemilius, the subjugator of Epirus. Julius Caesar retrieved his shattered fortunes by enormous operations in the slave market during his campaign in Gaul. Thus, unfortunately for the slave, the slave market was continually glutted and slave life was cheap. The condition of the slave gradually but slowly improved under the emperors. The killing of the slave of another was not an offence under the lex Cornelia de sicariis itself, but by the interpretation of later times it was brought under this law. A lex Petronia of uncertain date, but which must have been passed before the destruction of Pompeii, A. D. 79, being mentioned in an inscription found there, required a slave-owner to obtain the permission of a magistrate before exposing a slave to be torn to pieces by wild beasts, and only allowed such permission to be granted for some offence committed by the slave, Dig. 48, 8, 11, 2. Claudius prohibited a master killing his own slaves who fell sick, and enacted that the exposure of a slave to perish in his sickness should operate as a manumission, conferring Latinitas, Sueton. Claud. 25, Cod. 7, 6, 3. Hadrian is said to have deprived proprietors of the power of putting slaves to death without a judicial sentence, Spartian, Had. 18 (but see on this Mommsen, Strafr., p. 617, n. 2). Antoninus Pius declared a

master who killed his own slave to be responsible in the same way as if he had killed the slave of another, cf. § 53, 3 § 213, i. e. guilty of murder, and subject to the penalty of the lex Cornelia de sicariis. We read in Justinian's Digest: Qui hominem occiderit punitur non habita differentia cujus conditionis hominem interemit, Dig. 48, 8, 2. The punishment was generally capital, Dig. 48, 8, 3, 5. It is to be remembered, however, that none of these laws deprive the master of the right of punishing his slaves himself for domestic offences. Hadrian prohibited the castration of a slave, consenting or not consenting, under penalty of death, Dig. 48, 8, 4, 2. Antoninus Pius also protected slaves against cruelty and personal violation, Dig. 1, 6, 2, obliging the master, as we see by the text, to manumit them on account of his maltreatment. The Digest, 1, 6, 1, quoting § 53, after sine causa, interpolates, legibus cognita, thus placing slaves under the protection of the law, and almost recognizing in slaves some of the primordial rights of humanity, except that, as already observed, obligation does not necessarily imply a correlative right. Roman law to the end, unlike other legislations which have recognized forms of slavery, refused to admit any rights in the slave. Florentinus, however, not long after the time of Gaius, admitted that slavery, though an institution of jus gentium, was a violation of the law of nature. Servitus est constitutio juris gentium qua quis domino alieno contra naturam subicitur, Dig. 1, 5, 4. Ulpian says the same: Quod attinet ad jus civile, servi pro nullis habentur, non tamen et jure naturali; quia quod ad jus naturale attinet, omnes homines aequales sunt, Dig. 50, 17, 32. 'Before the Civil law a slave is nothing, but not before the Natural law; for in the eye of Natural law all men are equal.' The belief in a Natural law, more venerable than any Civil law, was very prevalent in the ancient world, and one of the principal contributions of Philosophy to civilization.

The absolute privation of all rights was sometimes expressed by saying that a slave has no persona, caput, or status: e. g. Servos quasi nec personam habentes, Nov. Theod. 17. Servus manumissus capite non minuitur quia nullum caput habet, Inst. 1, 16, 4. Cum servus manumittitur, quia servile caput nullum jus habet, ideo nec minui potest, eo die enim incipit statum habere, Dig. 4, 5, 4. The word 'persona,' however, is sometimes applied to slaves; e. g. in personam servilem nulla cadit obligatio, Dig. 50, 17, 22. So is caput in the last but one of the above-quoted passages.

But though a Roman slave was incapable of being invested with rights for himself, yet he often filled positions of considerable importance both in public and private life and was allowed by his owner to hold a considerable peculium. It was because slaves were

ordinarily employed as procuratores in commercial transactions, that Roman law failed to develop the principle of contractual agency, as it is understood in modern systems of jurisprudence.

DE PATRIA POTESTATE.

§ 55. Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreauimus. quod ius proprium ciuium Romanorum est; fere enim nulli alii sunt homines qui talem in filios suos habent potestatem qualem nos habemus. idque diuus Hadrianus edicto quod proposuit de his, qui sibi liberisque suis ab eo ciuitatem Romanam petebant, significauit. nec me praeterit Galatarum gentem credere in potestate parentum liberos esse. Inst. 1, 9 pr.

§ 55. Again, a man has power over his own children begotten in civil wedlock, a right peculiar to citizens of Rome, for there is scarcely any other nation where fathers are invested with such power over their children as at Rome; and this the late Emperor Hadrian declared in the edict he published respecting certain petitioners for a grant of Roman citizenship to themselves and their children; though I am aware that among the Galatians parents are invested with power over their children.

§ 55. The most peculiar portion of the Roman law of status is that which refers to patria potestas, or the relation of paterfamilias to filiusfamilias. Patria potestas was founded on consuetudinary law (cum jus potestatis moribus sit receptum, Dig. 1, 6, 8), and may be considered under two heads, (1) as regarding the person of the son, (2) as regarding proprietary rights acquirable by the son.

1. Over the person of the child the father had originally a power of life and death. Patribus jus vitae in liberos necisque potestas olim erat permissa, Cod. 8, 47, 10. So the lex Pompeia de parricidiis, enumerating the persons who could be guilty of parricide, or the murder of a blood relation, omits the father, Dig. 48, 9. Compare also the formula of Adrogatio, §§ 97–107, commentary. But in later times this power was withdrawn. Hadrian condemned to deportation a father who in the hunting-field killed his son who had committed adultery with his stepmother, Dig. 48, 9, 5. Constantine, A.D. 319, included killing by a father under the crime of parricide, Cod. 9, 17. Fathers retained the power of moderate chastisement, but severe punishment could only be inflicted by the magistrate, Cod. 8, 46, 3. Si atrocitas facti jus domesticae emendationis excedat, placet enormis delicti reos dedi judicum notioni, Cod. 9, 15. Trajan compelled a father to emancipate a son whom he treated with inhumanity, Dig. 37, 12, 5. It was originally at

the option of the parent whether he would rear an infant or expose it to perish, but in later times such exposure was unlawful, as was declared by Valentinian, Valens, and Gratian, A.D. 374, Cod. 8, 51, 2.

Originally also parents had the power of selling (mancipandi) their children into bondage, thus producing a capitis minutio, or degradation of status. The patriarchs of the Roman race may perhaps have been slave-dealers who, like some savage tribes in Africa and elsewhere, trafficked in the bodies of their own children, but we must note that the bondage into which a Roman father sold his children was, at least at the time at which this institution is known to us, a limited degree of subjection: the mancipation, which if made three times released a son from his father's power according to a provision of the Twelve Tables, could only be made to another Roman citizen, and the bondsman continued to be liber and civis. And this power also was withdrawn in more civilized times. A law of Diocletian and Maximian, A.D. 294, declares the sale, donation, pledging of children to be unlawful, Cod. 4, 43, 1. A rescript of one of the Antonines commences in the following terms, Cod. 7, 16, 1: 'You are guilty, by your own admission, of an unlawful and disgraceful act, as you state that you sold your freeborn children.' Justinian increased the penalties of the law against creditors who took possession of the freeborn child of a debtor as a security for a debt. He enacted that the creditor should forfeit the debt, should pay an equal sum to the child or parent, and in addition should undergo corporal punishment, Novella, 134, 7. In the time of Gaius, the only genuine sale of a child into bondage was in the case of noxal surrender, i.e. when a father sued for the delict of a child, in lieu of damages, surrendered his delinquent son or daughter as a bondsman (mancipium) to the plaintiff, § 140. The sale of the child in adoption and emancipation was merely fictitious; even noxal surrender was practically obsolete in the time of Justinian, by whom it was formally abolished, Inst. 4, 8, 7. Constantine, however, A.D. 329, in cases of extreme poverty permitted parents to sell their children immediately after birth (sanguinolentos), and this constitution was retained in the code of Justinian, Cod. 4, 43, 2.

2. In respect of property, filiusfamilias was capable of obligation but not of right; he could be debtor but not creditor; in any transaction where an independent person (sui juris) would have been creditor, filiusfamilias was merely a conduit-pipe through which a right vested in his father as creditor or proprietor. Even in domestic relations filiusfamilias could only figure as inferior, not as superior; he owed obedience, but could not exercise command

(jus, in the special sense which it has in the phrases, sui juris, alieni juris); he could only be an instrument by which his father acquired a right of command. Thus, filiusfamilias had commercium, and could take by mancipatio, but the property he thus took vested in his father; he could make a valid contract, but the contractual right vested in his father; he had testamentifactio, that is, he could be witness, libripens, familiae emptor, but he could not make a will, for he had no property to leave; and if he took under a will as legatee or heir, the legacy or succession vested in his father: cf. 2 § 87; 3 § 163, comm. He had the other element of civitas, connubium; that is, he could contract a civil marriage and beget civil children; but the patria potestas over these children vested not in the father but in the grandfather, and if the marriage was accompanied with power of hand (manus), marital power over the wife, this vested not in the husband but in the husband's father. Any property which the son was allowed by his father to manage was called his peculium, i.e. was held on the same terms as property which a slave administered by permission of his proprietor. In respect of debts which he incurred, the son did not act as conduit-pipe, but (except for a loan of money, which the Sc. Macedonianum made irrecoverable) was liable in his own person, Dig. 44, 7, 39. 'A son under power incurs obligation by the same titles, and may be sued on the same grounds of action as an independent person.' The same rule applied to the son as to the slave: Melior conditio nostra per servos fieri potest, deterior fieri non potest, Dig. 50, 17, 133. 'The melioration of his proprietor's condition is in the power of a slave, but not the deterioration.'

In his public functions, filiusfamilias was entirely beyond the sphere of patria potestas. Quod ad jus publicum attinet non sequitur jus potestatis, Dig. 36, 1, 14. Thus, a son could act as praetor or as judex in a suit to which his father was a party. He could even preside as magistrate over his own adoption or emancipation: Si consul vel praeses filiusfamilias sit, posse eum apud semetipsum vel emancipari vel in adoptionem dari constat, Dig. 1, 7, 3 (which makes it doubtful how far political functions were suspended even by the state of mancipium or bondage). He could also be appointed guardian (tutor), for guardianship (tutela) was held to be a public function, Dig. 1, 6, 9. 'A filiusfamilias in his public relations is deemed independent, for instance, as magistrate or as guardian.'

The above-stated incapacities of filiusfamilias were subject, however, to certain exceptions and modifications, which may now be briefly considered.

a. In certain cases filiusfamilias had an anomalous right of suing

in his own name (suo nomine), i.e. not merely as procurator or attorney of his father, and even in opposition to his father's wishes, Dig. 44, 7, 9. 'A filiusfamilias can only, according to Julian, sue in his own name for outrage, by interdict for violent or clandestine disturbance, for a deposit, and for a thing he has lent for use.' These suits, which, in spite of the statement in the text, were not the only, though perhaps the oldest, actions maintainable by a person under power, deserve a brief explanation. Without the right to Honour, one of the primordial rights of humanity, a man is scarcely a freeman, and, accordingly, this right vests definitively in filiusfamilias, and does not again pass out of him to vest in his father. Any dishonouring outrage, therefore, gave filiusfamilias a right of bringing a civil action, called actio injuriarum, in his own name, though the paterfamilias as a rule maintained the action both on his own account and that of his son; if, however, he was unable to do so, or his character was dubious, the son could proceed by himself (cf. 3 § 221, and Dig. 47, 10, 17, 10, &c.), although any pecuniary damages that he thereby recovered, being in the nature of property, were recovered for his father. The son under power was recognized, then, as invested with a vindictive right, though not with a proprietary right. The actio injuriarum was one in bonum et aequum concepta (compare Dig. 47, 10, 11, 1, and Dig. 44, 7, 34 pr.), that is, the terms of the formula (conceptio) directed the judex to assess the damages not on any strict principle of law, but by his own sense of natural equity (aequum et bonum), and this form may have helped to make the action maintainable by one who was generally incompetent to sue. The interdict quod vi aut clam was maintainable by filiusfamilias on the same principle as the actio injuriarum, being a means of vindicating a dishonouring outrage inflicted on filiusfamilias by some violent disturbance of real immovable property in defiance of his prohibitio or summons to stay operations and let the matter abide the result of a judicial trial. Cf. 4 §§ 138–170, comm. On the same principle a filiusfamilias disinherited or passed over in the will of his mother or maternal grandfather, as such disinheritance or pretermission was an implied imputation of turpitude or unworthiness and therefore dishonouring, might without the consent of his father (Dig. 5, 2, 22 pr.) vindicate his honour by impeaching the will of inofficiositas (immorality, or want of natural affection), although such querela inofficiosi testamenti, being an action having a right to property for its object, would not otherwise have been maintainable by a filiusfamilias. If the plaintiff filiusfamilias could show that the disinheritance or omission was not due to his own demerits, he invalidated the will by a

fictitious presumption of the testator's lunacy and made the testator intestate; and thus filiusfamilias vindicated his own character, though whatever share he recovered in the intestate succession vested in his father. Cf. 2 §§ 152–173, comm.; Inst. 2, 18.

The right of filiusfamilias to sue by actio commodati or depositi was founded on a different principle. Suppose that filiusfamilias had borrowed or hired a thing that he afterwards lent or deposited; his father, not being responsible for his son's debts, would not be interested in the recovery of the thing, and therefore was not entitled to sue the depositary or borrower: the son, however, would be answerable to the original lender or letter, and accordingly was allowed to sue in his own name. To avoid, however, contravening the civil law by affirming a proprietary right vested in a filiusfamilias, he did not sue by a formula in jus concepta, i. e. of the form, si paret oportere, 'if the plaintiff establish a right,' but by a formula in factum, of the form, si paret factum esse, 'if the plaintiff establish a fact.' It is remarkable that Gaius instances precisely the actio commodati and the actio depositi as having two forms, one in jus and another in factum (4 § 47); and we may conjecture that the latter was invented to be used under these very circumstances by filiusfamilias.

b. The latter periods of Roman law present a gradual emancipation of filiusfamilias by successive inventions of new kinds of peculium. As early as the time of Augustus filiusfamilias was allowed to dispose freely by will of his earnings in military service, castrense peculium, which came to be treated in all respects as his individual property, except that till the time of Justinian the rules of intestate succession did not apply to it. Filiifamilias in castrensi peculio vice patrumfamiliarum funguntur, Dig. 4, 6, 2. Subsequently to the time of Gaius, under Constantine and his successors, the earnings of filiifamilias in the civil service of the State, in holy orders, in the liberal professions, were assimilated to their earnings in the army, and came to be called peculium quasi castrense. Further, in the time of Constantine, it was also established that whatever came to the son from his mother or, as the law was under Justinian, from the maternal line, or from any source but the paternal estate (ex re patris), should be acquired for the father, and held by him only as a usufruct or life estate, while, subject to this, the son had the ownership of it (peculium adventicium). Peculium adventicium thus included everything acquired by the son which was not castrense peculium, nor quasi-castrense peculium, nor acquired by means of the father's property (ex re patris). Only this latter peculium derived from the paternal estate continued, under the name of peculium profecticium, subject to the old rules, and belonged in

absolute property to the father. Cf. 2 § 87, comm.; Inst. 2, 9, 1; 3, 19, 6; 4, 8, 7; 3, 10, 2, 28 pr.

The Gallic race, of which the Galatians were a branch, are mentioned by Caesar as having the institution of patria potestas: Viri in uxores, sicuti in liberos, vitae necisque habent potestatem, De Bello Gall. 6, 19. St. Paul in his Epistle to the Galatians may perhaps allude to the peculiarity of their law: 'The heir, as long as he is a child, differeth nothing from a servant (slave), though he be lord of all'; 4, 1, though the Apostle seems to be directly referring to the cognate institution of guardianship.

DE NVPTIIS.

§ 56. |———————,| si ciues Romanas uxores duxerint, uel etiam Latinas peregrinasue cum quibus conubium habeant; cum enim conubium id efficiat, ut liberi patris condicionem sequantur, euenit ut non ⟨*solum*⟩ ciues Romani fiant, sed et*iam* in potestate patris sint. Inst. 1, 10 pr.

§ 57. Unde *et* ueteranis quibusdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisue quas primas *post* missionem uxores duxerint; et qui ex eo matrimonio nascuntur, et ciues Romani et in potestat*e* parentum fiunt.

§ 58. | *Non tamen omnes nobis uxores ducere licet;* | nam a quarundam nuptiis abstinere debemus; Inst. 1. c.

§ 59. inter eas enim personas quae parentum liberorumue *locum* inter se optinent nuptiae contrahi non possunt, nec inter eas conubium est, ueluti inte*r* patrem et filiam, uel inter matrem et filium, uel inter auum et neptem; et si

§ 56. A Roman citizen contracts civil wedlock and begets children subject to his power when he takes to wife a citizen of Rome or a Latin or alien with whom a Roman has capacity of civil wedlock; for as civil wedlock has the effect of giving to the children the paternal condition, they become by birth not only citizens of Rome, but also subject to the power of the father.

§ 57. And for this purpose veterans often obtain by imperial constitution a power of civil wedlock with the first Latin or alien woman they take to wife after their discharge from service, and the children of such marriages are born citizens of Rome and subject to paternal power.

§ 58. But it is not any woman that can be taken to wife, for some marriages are prohibited.

§ 59. Persons related as ascendent and descendent are incapable of lawful marriage or civil wedlock, father and daughter, for instance, mother and son, grandfather and granddaughter; and if such relations unite, their unions are called incestuous and nefarious; and so absolute is the

tales personae inter se coierint, nefarias et incestas nuptias contraxisse dicuntur. et haec adeo ita sunt, ut quamuis per adoptionem parentum liberorumue loco sibi esse coeperint, non possint inter se matrimonio coniungi, in tantum, ut etiam dissoluta adoptione idem iuris maneat; itaque eam quae mihi per adoptionem filiae *aut* neptis loco esse coeperit non potero *u*xore*m* ducere, quamuis eam emancipauerim. Inst. l. c.

rule that merely adoptive ascendents and descendents are for ever prohibited from intermarriage, and dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

§ 60. Inter eas quoque personas quae ex transuerso gradu cognatione iunguntur est quaedam similis obseruatio, sed non tanta.

§ 60. Collateral relatives also are subject to similar prohibitions, but not so stringent.

§ 61. Sane inter fratrem et sororem prohibitae sunt nuptiae, siue eodem patre eademque matre nati fuerint, siue alterutro eorum: sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem const*at* adoptio, sane inter me et eam nuptiae non possunt consistere; cum uero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; sed et si ego emancipatus fuero, nihil in*pe*dimento erit nuptiis.

§ 61. Brother and sister, indeed, are prohibited from intermarriage whether they are born of the same father and mother or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage.

§ 62. Fratris filiam uxorem ducere licet, idque primum in usum uenit, cum diuus Claudius Agrippinam fratris sui filiam uxorem duxisset; sororis uero filiam uxorem ducere non licet. et haec ita principalibus co*n*stitutionibus significantur. Item amitam et materteram uxorem ducere non licet.

Inst. 1, 10, 3–5.

§ 62. A man may marry his brother's daughter, a practice first introduced when Claudius married his brother's daughter Agrippina, but may not marry his sister's daughter, a distinction laid down in imperial constitutions, nor may he marry his father's sister or his mother's sister.

§ 63. Item eam quae mihi quondam socrus aut nurus aut priuigna aut nouerca fuit. ideo

§ 63. He may not marry one who has been his wife's mother or his son's wife or his wife's

autem diximus 'quondam,' quia si adhuc constant eae nuptiae, per quas talis adfinitas quaesita est, alia ratione mihi nupta esse non potest, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.
Inst. 1, 10, 6.

daughter or his father's wife. I say, one who has been so allied, because during the continuance of the marriage that produced the alliance there would be another impediment to the union, for a man cannot have two wives nor a woman two husbands.

§ 64. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere uidetur neque liberos; itaque hi qui ex eo coitu nascuntur matrem quidem habere uidentur, patrem uero non utique: nec ob id in potestate eius ⟨*sunt, sed tales*⟩ sunt quales sunt hi quos mater uulgo concepit; nam et hi patrem habere non intelleguntur, cum *is* et*iam* incertus sit; unde solent spurii filii appellari, uel a Graeca uoce qu*a*si σποράδην concepti, uel quasi sine patre filii.
Inst. 1, 10, 12.

§ 64. A man who contracts a nefarious and incestuous marriage is not deemed to have either a wife or children; for the offspring of such a union are deemed to have a mother but no father, and therefore are not subject to paternal power; resembling children born in promiscuous intercourse, who are deemed to have no father, because their true father is uncertain, and who are called bastards either from the Greek word denoting illicit intercourse or because they are fatherless.

In any treatise on the law of marriage that we open we shall meet the expression, the marriage contract; and this suggests the inquiry, is marriage a contract, and, if so, to which class of Roman contracts, Verbal, Literal, Real, Consensual, 3 § 89, is Roman marriage to be referred? Most writers assume that it was a Consensual contract, on the strength of texts like the following: Nuptias non concubitus sed consensus facit, Dig. 35, 1, 15. 'Marriage does not depend on cohabitation, but on consent.' Ortolan, however, remarks that consensual contracts could be formed by absent contractors, Inst. 3, 22, 2, whereas a marriage could not be contracted in the absence of the wife, Paul, 2, 19, 8; and shows that, besides the consent of the parties, delivery of possession of the wife to the husband was required, from which he infers that Roman marriage was not a Consensual but a Real contract. It is true that marriage might be contracted in the absence of the husband; but this was only under certain conditions, Dig. 23, 22, 5. 'A man in his absence may marry by letter or message, provided the woman is led to his house: a woman in her absence cannot marry by letter or message, for the leading must be to the husband's house, as the domicile of the married pair.' And precisely the same conditions

were sufficient in other cases to constitute delivery of possession, Dig. 41, 2, 18, 2. 'If a vendor deposit any article in my house by my order, I have possession of it though I have never touched it.' Consensus, then, in the above-quoted passage, is not opposed to delivery of possession, but to cohabitation, or to the use of certain words or certain documents, or to the solemn and graceful ceremonial with which custom surrounded the matrimonial union.

Real contracts, however, are executory on one side and executed on the other, whereas in the conjugal relation both parties are on the same footing in respect of execution; and we may ask whether marriage is a contract at all; whether it does not rather fall under the opposite category of alienation or conveyance. Instead of finding its analogon in locatio-conductio or societas (consensual contracts) or pignus or commodatum (real contracts), may we not rather, with Savigny, find it in transfer of dominion or other creations of real right, such as adoption, the concession of patria potestas, or emancipation? This seems the truer view, and if we use the expression, marriage contract, we must use the term contract not in a specific sense, as opposed to conveyance, but in the generic sense of bilateral disposition (as opposed to unilateral disposition, e.g. testation), a sense embracing both contract proper and conveyance, and extending beyond the sphere of Property into the relations of domestic life. Contract proper and conveyance, though generally contrasted in jurisprudence, have much in common. If contract in its narrower sense is defined to be the concurrence of two manifestations of will creating a jus in personam, and conveyance the concurrence of two manifestations of will creating a jus in rem, the concurrence of two manifestations of will creating a jus is an element common to both terms of the comparison, and this common element may be denominated in a generic sense a contract. Contract in the narrower sense may then be distinguished as an obligative contract and conveyance as a translative contract, and the latter head will include the contract of marriage, if we continue to employ this expression.

As in respect of property or dominion we find in Roman law the distinction of Quiritary and Bonitary, that is, of civil and gentile, ownership, so in respect of the conjugal relation we find the distinction of Roman or civil marriage (connubium, justae nuptiae, justum matrimonium) and gentile marriage (nuptiae, matrimonium), of which the former alone was valid at civil law (connubium est uxoris jure ducendae facultas, Ulpian, 5, 3; 'connubium is the capacity of marriage valid by civil law') and capable of producing patria potestas and agnatio, though the latter produced legitimate children (justi

as opposed to naturales liberi) and cognatio or natural relationship.

Capacity of civil marriage (connubium) is (*a*) absolute and (*b*) relative. (*a*) Only citizens have the absolute capacity of civil marriage, and such Latins and aliens as are specially privileged, § 56: slaves are incapable both of civil and gentile marriage. (*b*) Capacity of civil marriage is, however, always relative to another person who forms the other party to the union. A citizen only has connubium with a citizen or with such Latins and aliens as are specially privileged; and, before the lex Papia Poppaea was passed, a freeborn citizen (ingenuus) had no connubium with a citizen by manumission (libertinus). Lege Papia cavetur omnibus ingenuis, praeter senatores eorumque liberos libertinam uxorem habere licere, Dig. 23, 2, 23. 'The lex Papia permits all freeborn citizens, except senators and their children, to marry freedwomen.'

§§ 58–63. The prohibition of marriage between collateral relations, originally perhaps extended as far as there were legal names for the relationship, i. e. as far as the sixth degree, for Tacitus mentions that second cousins were once incapable of intermarriage, sobrinarum diu ignorata matrimonia, Ann. 12, 6; and Livy (20, see Hermes, 4, 372), in a fragment discovered by Krueger, expressly says that marriage was once restricted within this limit. 'P. Coelius patricius primus adversus veterem morem intra septimum cognationis gradum duxit uxorem. Ob hoc M. Rutilius plebeius sponsam sibi praeripi novo exemplo nuptiarum dicens sedicionem populi concitavit adeo, ut patres territi in Capitolium perfugerent' (cf. Karlowa, Röm. Rechtsg., p. 175); but though marriages within this limit may still have been regarded as contrary to religion (fas), the law (jus) was gradually relaxed. The prohibition was subsequently reduced to the fourth degree, i. e. to the intermarriage of first cousins (consobrini), Ulpian, 5, 6, with this restriction, however, that if one of the collaterals was only removed by one degree from the common ancestor (stipes communis), he was regarded as a quasi ascendent (loco parentis) and incapable of intermarriage at any degree: thus, a man could not marry his brother's or sister's granddaughter, though only related in the fourth degree, Cod. 5, 4, 17. Degrees in the direct line were reckoned by counting the generations or births to which a person owed his descent from an ancestor: thus, a man is one degree from his father, two from his grandfather: in the transverse or collateral line, by adding the degrees which separate each collateral from the common stock; thus, a man is two degrees from his sister, three from his niece.

Constantinus, A. D. 355, restored the ancient law and prohibited

marriage with a brother's daughter as incestuous, Cod. Theod. 3, 12, 1.

Affinity (affinitas) is the relationship of a person to the kin (cognates) of a spouse. The husband is allied to the kin of the wife, the wife to the kin of the husband; but there is no alliance between the kin of the husband and the kin of the wife. The following are some of the names given to these relationships. In the ascending line the father and mother of the wife or husband are socer and socrus (father-in-law, mother-in-law), and in relation to them the husband of the daughter and wife of the son are gener and nurus (son-in-law, daughter-in-law). In the descending line the children of the spouse are privignus and privigna (step-son, step-daughter), and in relation to them the husband of the mother and the wife of the father are vitricus and noverca (step-father and step-mother). In the collateral line the husband's brother is levir (brother-in-law), the husband's sister is glos (sister-in-law). Intermarriage with affines in the direct line, or their ascendents or descendents, was absolutely prohibited; collateral alliance appears to have been no impediment in the time of Gaius, but at a later period marriage with a deceased brother's wife or a deceased wife's sister was forbidden, Cod. Theod. 2, 3, 12; Cod. 5, 5, 5.

To the marriage of a filius- or filia-familias the consent of the father was required: but if he withheld it without a reason he could be compelled by the magistrate to give it, and, in the case of a daughter, to provide a dower, Dig. 23, 2, 19: one of several instances in which, as the condition of the validity of a title, when a voluntary action could not be obtained, the legislator substituted a compulsory action, instead of simply declaring the action unnecessary. See § 190, comm.

DE ERRORIS CAVSAE PROBATIONE.

§ 65. | *Aliquando autem euenit ut liberi qui statim ut na*|*ti* sunt parentum in potestate non fiant, ii postea tamen redigantur in potestatem.

Inst. 1, 10, 13.

§ 65. It sometimes happens that children when first born are not in their father's power, but are subsequently brought under it.

§ 66. *Veluti si Latin*us ex lege Aelia Sentia uxore ducta filium procreauerit aut Latinum ex Latina aut ciuem Romanum ex ciue Romana, non habebit eum in potestate; *sed si postea causa pro*bata *ius* ⟨*Quiritium*⟩

§ 66. Thus, under the lex Aelia Sentia a Latin who marries and begets a son of Latin status by a Latin mother, or a citizen of Rome by a Roman mother, has not power over him; but on proof of his case as required by the

consec*utus fuerit*, simul *e*um in potestate sua habere incipit.

§ 67. Item si ciuis Romanus Latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam ciuem Romanam esse crederet, et filium procreauerit, hic non est in potestate eius, quia ne qu*i*dem ciuis Romanus est, sed aut Latinus aut peregrinus, id est eius condicionis cuius et mater fuerit, quia non aliter quisque ad patris condicionem accedit, quam si inter patrem et matrem eius conubium sit; sed ex senatusconsulto permittitur causam erroris probare, et ita uxor quoque et filius ad ciuitatem Romanam perueniunt, et ex eo tempore incipit filius in potestate patris esse. idem iuris est, si eam per ignorantiam uxorem duxerit quae dedi*ti*ciorum numero est, nisi quod uxor non fit ciuis Romana.

§ 68. Item si ciuis Romana per errorem nupta sit peregrino tamquam ciui Romano, permittitur ei causam erroris probare, et ita filius quoque eius et maritus ad ciuitatem Romanam perueniunt, et aeque simul incipit filius in potestate patris esse. idem iuris est, si peregrino tamquam Latino ex lege Aelia Sentia nupta sit; nam et de hoc specialiter senatusconsulto cauetu*r*. idem iuris est aliquatenus, si ei qui dedi*ti*cioru*m* numero est tamquam ciui Romano aut Latino *e* lege Aelia Sentia nupta sit; nisi quod scilicet qui dediticiorum numero est, in sua condicione permanet, et ideo filius, quamuis fiat ciuis Romanus,

statute, he becomes a Roman citizen along with his son, who is henceforth subject to his power.

§ 67. Again, if a Roman citizen marry a Latin or an alien woman, in a mistaken belief that she is a Roman citizen, the son whom he begets is not in his power, not indeed being born a Roman citizen, but a Latin or an alien, that is to say, of the same status as his mother, for a child is not born into the condition of his father unless his parents had capacity of civil marriage: but a senatusconsult allows the father to prove a cause of justifiable error, and then the wife and son become Roman citizens, and the son is thenceforth in the power of the father. The same relief is given when a Roman citizen under a like misconception marries a freedwoman having the status of a surrendered foe, except that the wife does not become a Roman citizen.

§ 68. Again, a female Roman citizen who marries an alien, believing him to be a Roman citizen, is permitted to prove a cause of justifiable error, and thereupon her son and husband become Roman citizens, and simultaneously the son becomes subject to the power of his father. Similar relief is given if she marry an alien as a Latin intending to comply with the conditions of the lex Aelia Sentia, for this case is specially provided for in the senatusconsult. Similar relief is given to a certain extent if she marry a freedman having the status of a surrendered foe instead of a Roman citizen, or instead of a Latin, whom she intended to marry according to the provision of the lex Aelia Sentia, except that the freedman

in potestatem patris non redigitur.

§ 69. Item si Latina peregrino, cum eum Latinum esse crederet, ⟨*e lege Aelia Sentia*⟩ nupserit, potest ex senatusconsulto filio nato causam erroris probare, *et ita* omnes fiunt ciues Romani et filius in potestate patris esse incipit.

§ 70. Idem constitutum est, si Latinus per errorem peregrinam quasi Latinam aut ciuem Romanam e lege Aelia Sentia uxorem duxerit.

§ 71. Praeterea si ciuis Romanus, qui se credidisset Latinum ess*e*, ob id Latinam ⟨*uxorem duxerit*⟩, permittitur *ei* filio nato erroris causam probare, tamqua*m* ⟨*si*⟩ e lege Aelia Sentia uxorem duxiss*e*t. Item his qui cum ciues Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex senatusconsulto filio nato causam erroris probare; quo facto fiet | uxor ciuis Romana et filius—— non solum *ad ciuita*|tem Romanam peruenit, sed etiam in potestat*em* patris redigitur.

§ 72. Quaecumque de filio esse diximus, eadem et de filia dicta intellegemus.

§ 73. Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius sit | ———|———|—, si minor *anniculo* sit filius filiaue, causa probari | non potest. nec me *praeterit* in aliquo rescripto *diui* Hadriani ita esse consti-

husband continues of the same status, and therefore the son, though he becomes a Roman citizen, does not fall under paternal power.

§ 69. Also a Latin freedwoman married according to the provision of the lex Aelia Sentia to an alien whom she believed to be a Latin, is permitted by the senatusconsult, on the birth of a son, to prove a cause of justifiable error, and thereupon they all become Roman citizens, and the son becomes subject to paternal power.

§ 70. Exactly the same relief is given if a Latin freedman mistakenly marry an alien woman believing her to be a Latin freedwoman, or a Roman citizen, when he intended to comply with the lex Aelia Sentia.

§ 71. Further, a Roman citizen who marries a Latin freedwoman, believing himself to be a Latin, is permitted on the birth of a son to prove the cause of his mistake as if he had married according to the provisions of the lex Aelia Sentia. So, too, a Roman citizen, who marries an alien, believing himself to be an alien, is permitted by the senatusconsult on the birth of a son to prove the cause of the mistake, and then the alien wife becomes a Roman citizen, and the son becomes a Roman citizen and subject to the power of the father.

§ 72. Whatever has been said of a son applies to a daughter.

§ 73. And as to the proof of the cause of error, the age of the son or daughter is immaterial, except that, if the marriage was contracted with an intention to satisfy the requirements of the lex Aelia Sentia, the child must be a year old before the cause can be proved.

tutum, tamquam qu*od* ad erroris q*uoque* | *causam* probandam——|——|——imperator——dedit.

I am aware that a rescript of the late Emperor Hadrian speaks as if it was a condition of proof of the cause of error that the son must be a year old, but this is to be explained by the particular circumstances of the case in which this rescript was granted.

§ 74. ⟨*Sed*⟩ si peregrinus ciuem Romanam uxorem d*u*xerit, an ex senatusconsulto *causam* pro|*b*are possit, quaesitum e*st*. —— *probare* | causam non potest, quamuis ipse—— — | hoc ei specialiter concessum est. sed cum peregrinus ciuem Romanam uxorem duxisset et filio nato alias ciuitatem Romanam consecutus esset, deinde cum qu*ae*reretur, an causam probare posset, rescripsit imperator Antoninus proinde posse eum causam probare, atque si peregrinus mansisset. ex quo colligimus etiam peregrinum causam probare posse.

§ 74. It is a question whether an alien, who has married a Roman wife, can prove cause of error under the S. C. But when an alien, believed to be a Roman citizen, married a Roman wife, and subsequently to the birth of a son acquired Roman citizenship, on the question arising whether he could prove the cause of error, a rescript of Antoninus Pius decided that he was just as competent to prove as if he had continued an alien: from which may be gathered that an alien is competent to prove the cause of error.

§ 75. Ex his quae diximus apparet, siue ciuis Romanus peregrinam siue peregrinus ciuem Romanam uxorem duxerit, eum qui nascitur peregrinum *esse*. *sed* siquidem p*er* errorem tal*e* matrimonium contractum fuerit, emendari uitiu*m* eius ex *senatusconsulto* l*ic*et ⟨*secundum*⟩ ea qu*ae* superius diximus. si uero nullus error interuenerit, ⟨*sed*⟩ scientes suam condicionem ita coier*i*nt, nullo cas*u* eme*nd*atur uitium e*iu*s matrimonii.

§ 75. Hence it appears that a person born in marriage is an alien if his father was a Roman citizen and his mother an alien, or if his father was an alien and his mother a Roman citizen, though if the marriage was contracted under a mistake, a remedy is supplied by the S. C. as above explained. No relief is given in any case, where the parties did not contract marriage under an error, but were aware of their condition.

Mistake or error sometimes conferred a right which a party could not have acquired if he had not acted under a mistake. Thus, the lender of money to a filiusfamilias without the father's consent had no legal claim to recover, unless he lent believing the borrower to be independent (sui juris), and possession could not mature by usucapion into ownership, unless it had a bona fide inception, i.e.

unless it commenced in an honest misunderstanding. The relief of error had similarly important results in questions of status. Erroris causam probare seems to mean 'to make good a title by error,' i.e. to establish, as title (causa) to relief, a probabilis error or justa ignorantia; i.e. a mistake not due to negligence; for negligence would exclude from relief.

The subjection of a child to patria potestas by erroris causae probatio operated to invalidate a previously executed will, like the subsequent birth (agnatio) of a child in civil wedlock (suus postumus), 2 § 142.

DE STATV LIBERORVM.

§ 76. Loquimur autem de his scilicet, ⟨*inter*⟩ quos conubium non sit; nam ali*o*quin si ciuis Romanus peregrinam cum qua ei conubium est uxorem duxerit, sicut supra quoque diximus, iustum matrimonium contrahi*tur*; et tunc ex his qui nascitur ciuis Romanus est et in potestate patris erit.

§ 76. It is to be remembered that we are speaking of a marriage between persons who have not the capacity of entering into a civil marriage with one another. When, however, a Roman citizen takes to wife an alien privileged as I described (§ 56), he contracts a civil marriage, and his son is born a Roman citizen and subject to his power.

§ 77. It*em* si ciuis Romana peregrino, cum qu*o* ei conubium est, nupseri*t*, peregrinum sane procrea*t* et is iustus patris filius est, tamquam si ex peregrina eum procreasset. hoc tamen tempore ⟨*ex*⟩ senatusconsulto, quod auctore d*i*uo Hadrian*o* factum est, etiamsi non fuerit conubium inter ciuem Romanam et peregrinum, qui nasci*tur* iustus patris filius est.

§ 77. So if a female Roman citizen marry an alien with whom she has capacity of civil marriage, her son is an alien and a lawful son of his father, just as if his mother had been an alien. At the present day, by a senatusconsult passed on the proposition of the late Emperor Hadrian, even without civil marriage the offspring of a Roman woman and alien is a lawful son of his father.

§ 78. Quod autem diximus inter ciuem Romanam peregrin*um*que——— *qui* | nascitur peregrinum esse, lege Minicia cau*etur*,⟨———⟩ |est, ut s——— parentis condicionem *sequatur*.| eadem lege enim ex diuerso *cauetur*, *ut* si peregrin*am*, *cum* qua ei conubium non sit, uxorem dux*erit* *ciuis Romanus*,

§ 78. The rule we have stated that when a female Roman citizen marries an alien, the offspring is an alien, if there is no capacity of civil marriage between them, is enacted by the lex Minicia, which also provides that when a Roman citizen marries an alien woman, and there is no capacity of civil marriage between them, their offspring shall be an alien. This

peregrinus ex eo coitu nascatur. sed hoc maxime casu necessaria lex Minicia; nam remota ea lege diuers*am* condicionem sequi deb*ebat*, *quia* ex eis, inter quos non est conubium, qui nascitur iure gentium matris condicion*i* accedit. qua parte autem iubet lex ex ciue Romano et peregrina peregrinum nasci, superuacua uidetur; nam et remota ea lege hoc utique iure gentium | futurum erat.

§ 79. Adeo autem hoc ita est, ut ———|———|——— *non* | solum exterae nationes et gentes, sed etiam qui Latini nominantur; sed ad alios Latinos pertinet qui proprios populos propriasque ciuitates habebant et erant peregrinorum numero.

§ 80. Eadem ratione ex contrario ex Latino et ciue Romana, siue ex lege Aelia Sentia siu*e* *aliter contract*um fu*erit* matrimonium, ciuis Romanus nascitur. fuerunt tamen qui putauerunt ex lege Aelia S*entia* contracto matrimonio Latinum nasci, quia uidetur eo *c*asu per legem Aeliam Sentiam et Iuniam conubi*um* inter eos dari, et semper conubium eff*i*cit, ut qui nascitur patris condicioni accedat; al*i*ter uero contracto *m*atrimonio eum qui nascitur iure gentium matris condicionem sequi et ob id esse ciuem Romanum. s*ed* hoc iure utimur ex senatusconsulto, qu*o* auctore diuo Hadriano significatur, ut quo*quo* modo ex Latino et ciue Romana

special enactment was required in the first case, as otherwise the child would follow the condition of the mother; for when there is no capacity of civil marriage between parents, their offspring belongs to the condition of his mother by jus gentium. But the part of this law which ordains that the offspring of a Roman citizen and an alien woman is an alien seems to be superfluous, since without any enactment this would be so under the rule of jus gentium.

§ 79. So much so that it is under this rule of jus gentium that the offspring of a Latin freedwoman by a Roman citizen with whom she has no capacity of civil marriage is a Latin, since the statute did not refer to those who are now designated Latins; for the Latins mentioned in the statute are Latins in another sense, Latins by race and members of a foreign state, that is to say, aliens.

§ 80. By the same principle, conversely, the son of a Latin and a Roman woman is by birth a Roman citizen, whether their marriage was contracted under the lex Aelia Sentia or otherwise. Some, however, thought that if the marriage was contracted in accordance with the lex Aelia Sentia, the offspring is a Latin by birth, because on this hypothesis the lex Aelia Sentia and Junia confer a capacity of civil marriage, and a civil marriage always transmits to the offspring the status of the father: if the marriage was otherwise contracted, they held the offspring acquires by jus gentium the status of his mother. However, the law on this point is now determined by the senatusconsult passed on the proposition of the late Emperor

natus ciuis Romanus nascatur.

Hadrian, which enacts that the son of a Latin and a Roman woman is under every hypothesis a Roman citizen.

§ 81. His *con*uenien*ter* e*tiam* illud senatusconsultum diuo Hadriano auctor*e* significauit, ut ⟨*qui*⟩ ex Latino *et* peregrina, item contra ⟨*qui*⟩ ex peregrino et Latina nascit*ur*, is matris condicionem sequatur.

§ 81. Consistently herewith Hadrian's senatusconsult provides that the offspring of the marriage of a Latin freedman with an alien woman or of an alien with a Latin freedwoman follows the mother's condition.

§ 82. Illud quoque his consequens est, quod ex ancilla et libero iure gentium seruus nascitur, et contra ex libera et seruo liber nascitur.

§ 82. Consistently herewith the offspring of a female slave and a freeman is by jus gentium a slave, the offspring of a freewoman and a slave is free.

§ 83. Animaduertere tamen debemus, n*e* iuris gentium regulam ue*l* lex aliqua uel quod leg*is* uicem optinet, aliquo casu commutauerit.

§ 83. We must observe, however, whether the jus gentium in any given instance is overruled by a statute or ordinance having the authority of a statute.

§ 84. Ecce enim ex senatusconsulto Claudiano poterat ciuis Romana quae alieno seruo uolente domino eius coiit, ipsa ex pactione libera permanere, sed seruum procreare; n*am* quod inter eam et dominu*m* istius serui conuenerit, e*o* senatusconsulto ratum esse iubetur. sed postea diuus Hadrianus iniquitate rei et inelegantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat.

§ 84. For instance, the Sc. Claudianum permitted to a female citizen of Rome having intercourse with a slave with his owner's consent, to continue herself in virtue of the agreement free, while she gave birth to a slave, her agreement to that effect with the owner being made valid by the senatusconsult. Subsequently, however, the late Emperor Hadrian was induced by the injustice and anomaly of the ordinance to re-establish the rule of jus gentium, that as the mother continues free the offspring follows her status.

§ 85. ⟨*Item e lege* ——⟩ ex a*n*cilla et libero poterant *l*iber*i* nasci; nam ea lege cauetur, ut si quis cum aliena a*n*cilla quam credebat liberam esse coierit, siquidem mascu*l*i nascantur, liberi sint, si uero feminae, ad e*u*m pertinea*nt* *c*uius mater a*n*cilla fuerit. sed et in hac specie diuus Vespasianus in*e*legantia iuris motus

§ 85. By a law (*the name of which is unknown*) the offspring of a female slave by a freeman might be free, for that law provided that the offspring of a freeman by another person's female slave whom he believed to be free shall be free if they are male, but shall belong to their mother's proprietor if they are female: but here too the late Emperor Vespasian was moved by the

restituit iuris gentium regulam, ut omni modo, etiamsi masculi nascantur, serui sint eius cuius et mater fuerit.

anomalous character of the rule to re-establish the canon of jus gentium, and declared that the offspring in every case, whether male or female, should be slaves and the property of their mother's owner.

§ 86. Sed illa pars eiusdem legis salua est, ut ex libera et seruo alieno, quem sciebat seruum esse, serui nascantur. itaque apud quos talis lex non est, qui nas*ci*tur iure gentium matris condicione*m* sequitu*r* et ob id liber *est*.

§ 86. But another clause of that law continues in force, providing that the offspring of a freewoman by another person's slave whom she knows to be a slave are born slaves, though where this law is not established the offspring by jus gentium follow the mother's condition and are free.

§ 87. Quibus autem casibus matris et non patris condicione*m* sequitur qui nascitur, isdem casibus in potestate eum patris, etiamsi is ciuis Romanus sit, non esse plus quam manifestum est. et ideo superius rettulimus quibusdam casibus per errorem non iusto contracto matrimonio senatum interuenire et emendare uitium matrimonii, eoque modo plerumque efficere, ut in potestatem patris filius redig*a*tur.

§ 87. When the child follows the mother's condition instead of the father's, it is obvious that he is not subject to the power of the father, even though the father is a Roman citizen: but in some cases, as I mentioned above (§ 67), when a mistake was the occasion of a non-civil marriage being contracted, the senate interferes and purges the defect of the marriage, and this generally has the effect of subjecting the son to the power of the father.

§§ 76, &c. The rules relating to the status of the offspring of parents of unequal status are at first sight chaotic and bewildering, but they are reducible to a few canons. The most general canon is the rule of jus gentium, that children follow the condition of the mother. This is subject to two exceptions.

1. Children born in civil wedlock follow the condition of the father. Cf. §§ 88, 89, 94.

2. Children born in gentile (lawful) wedlock of a Roman mother and alien father follow the condition of the father: this was a special enactment of the lex Minicia.

These rules are stated in the following passages: Lex naturae haec est ut qui nascitur sine legitimo matrimonio matrem sequatur nisi lex specialis aliud inducat, Dig. 1, 5, 24. 'By the law of nature children not born in civil wedlock follow the status of the mother, in the absence of a special statute to the contrary.' Connubio interveniente liberi semper patrem sequuntur: non interveniente connubio, matris conditioni accedunt, excepto eo qui ex

peregrino et cive Romana peregrinus nascitur, quoniam lex Minicia (in MS. Mensia) ex alterutro peregrino natum deterioris parentis conditionem sequi jubet, Ulpian, 5, 8. 'In civil wedlock the children have the status of the father, in the absence of civil wedlock of the mother; except that the children of an alien father and Roman mother are aliens, as the lex Minicia makes the children aliens when either parent is an alien.'

The Sc. Claudianum introduced some special enactments respecting the intercourse of freewomen with slaves, which, however, were subsequently abolished.

a. If a freewoman had intercourse with a slave with the consent of his proprietor she retained her freedom, though degraded to the class of a freedwoman, but her issue was the slave of the proprietor. The slavery of the issue was abolished by Hadrian, § 84.

b. If a freewoman persisted in intercourse with the slave of another person against the will and in spite of the prohibition of the proprietor, after three denunciations on his part she was awarded to him by the magistrate as a slave, and her issue, whether born before or after the adjudication, became slaves of the same person, who also acquired her estate by a species of universal succession. Cf. §§ 91, 160. This terroristic law, which, from the minuteness with which the details are developed (Paulus, 2, 21), appears to have been often applied, was not abrogated till the time of Justinian, Inst. 3, 12, 1.

c. If a freeman had intercourse with a slave whom he supposed to be free by a law the title of which is lost, but which possibly may be the Sc. Claudianum, her male children were born into freedom. This relief of error was abolished by Vespasian as anomalous (inelegans), § 85.

§ 80. There was some ground for the view that a marriage under the lex Aelia Sentia, because it was statutory (regulated by statute), was therefore a civil marriage; and we may regard the senatusconsult of Hadrian, which denied its civil character, as not purely declaratory.

§ 88. Sed si ancilla ex ciue Romano conce*perit*, deinde manumissa ciuis Romana facta sit et tunc pariat, licet ciu*is* *Romanus* sit qui nascitur, sicut pater eius, non tamen in pote*state* patris est, quia neque ex iusto coitu conceptus est neque ex ullo senatusconsulto talis coitus quasi iustus consti*tuitur*.

§ 88. If a female slave conceive by a Roman citizen and become herself by manumission a Roman citizen before giving birth to a son, her son, though a Roman citizen like his father, is not in his father's power, because he was not begotten in civil wedlock, and there is no senatusconsult which cures the defect of the intercourse in which he was begotten.

§ 89. Quod autem placuit, si ancilla ex ciue Romano conceperit, deinde manumissa pep*er*erit, qui nascitur liberum nasci, *na*turali ratione fit; nam hi qui illegitime concipiuntur, statum sumunt ex eo tempore quo nascuntur; itaque si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos concep*er*it, cum ancilla fuerit; at hi qui legitime concipiuntur ex conceptionis tempore statum sumun*t*.

§ 90. Itaque si cu*i* mulieri ciui Romanae praegnati aqua et igni interdictum fuerit, eoque modo peregrina *facta* tunc pariat, conplures distinguunt et puta*nt*, siquidem ex iustis nuptiis concep*er*it, ciuem Romanum ex ea nasci, si uero uulgo concep*er*it, peregrinu*m* ex ea nasc*i*.

§ 91. Item si qua mulier ciuis Romana praegnas ex senatusconsulto Claudiano ancilla facta sit ob id, quod alieno seruo inuito et denuntiante domino eius ⟨*coierit*⟩, conplur*es distinguu*nt et existimant, siquidem ex iust*is* nuptiis concep*tus* sit, ciuem Romanum ex ea nasci, si uero uulgo conceptus sit, *seruum* nasci eius cuius mater facta esset ancilla.

§ 92. Peregrina quoque si uulgo conceperit, deinde ciuis Romana ⟨*fiat*⟩ *et* tunc pariat, ciuem Romanum parit; si uero ex peregrino secundum leges moresque peregrinorum concep*er*it, ita uidetur ex senatusconsulto quod auctore diuo Hadriano factum est ciuem Romanum parere, si et patri eius ciuitas Romana done*tur*.

§ 89. The decision that when a female slave conceives by a Roman citizen and is manumitted before childbirth, her offspring is born free, is a rule of natural law; for in illegitimate or non-civil conception the status of the offspring depends on the moment of birth, and the mother's freedom at the moment of birth makes the offspring free, and the status of the father is immaterial; but in statutory or civil conception the status of the child is determined by the time of conception.

§ 90. Accordingly, if a female citizen of Rome being pregnant is interdicted from fire and water, and becoming thus an alien gives birth to a child, many jurists distinguish and hold that her offspring is a Roman citizen if begotten in civil wedlock, but if in promiscuous intercourse, an alien.

§ 91. So if a female citizen of Rome being pregnant is reduced to slavery under the Sc. Claudianum for having intercourse with a slave in spite of the dissent and denunciation of his owner, many jurists make a distinction and hold that her offspring, if conceived in civil wedlock is a citizen of Rome, if conceived in illicit intercourse is a slave of the person who becomes proprietor of the mother.

§ 92. Also if an alien woman conceive in illicit intercourse and afterwards becomes a Roman citizen and gives birth to a child, the child is a Roman citizen; but if she conceived by an alien, to whom she was married in accordance with alien laws and customs, it seems that upon Hadrian's senatusconsult her offspring is only born a Roman citizen, if the father also has acquired the Roman citizenship.

Supposing the status of a parent changes during the period of gestation (if, for instance, the mother is a slave at the time of conception and free at the time of birth), what effect has this on the status of the issue? The following rule was adopted: in cases where the child follows the status of the father, that is, when it is begotten in civil marriage, the status of the father at the time of conception determines the status of the child; where the child follows the status of the mother, that is, when it is begotten in gentile marriage or in promiscuous intercourse, the status of the child is determined by the status of the mother at the moment of birth. Ulpian, 5, 10. 'Children born in civil wedlock have their status fixed at the time of conception; children born out of civil wedlock have their status fixed at the time of delivery.' That is to say, the legal position of the issue is made to follow the analogy of its physical condition. The physical influence of the father terminates with conception: his subsequent health, life, or death, does not affect the physical state of the child; but the child is affected by every change in the physical condition of the mother, her health, life, or death, up to the moment of birth. In imitation of this analogy, the status of the child, when it depended on the status of the father, was not affected by any change in that status subsequent to the period of conception; but when it depended on the status of the mother it varied with every change in that status up to the moment of birth. By the time of Gaius, though the change is not mentioned in the text, this rule was modified in favour of liberty, and it was established that if the mother was free either at the date of conception or at the date of birth or at any intermediate period, the issue was born free. Si libera conceperit et ancilla facta peperit, liberum parit, id enim favor libertatis exposcit. Si ancilla conceperit et medio tempore manumissa sit, rursus facta ancilla peperit, liberum parit, media enim tempora libertati prodesse, non nocere etiam possunt, Paulus, 2, 24, 2. Cf. Inst. 1, 4 pr.

§ 88. The issue of a mother who was a slave at the date of conception but is a citizen at the date of birth, though it is born a Roman citizen, is not subject to patria potestas, because it does not satisfy the definition in § 55, liberi quos justis nuptiis procreavimus, 'a child begotten in civil wedlock.'

§ 90. Aquae et ignis interdictio was originally a permission to avoid punishment under the penal code by voluntary exile. Subsequently it was employed as a punishment, and under the emperors assumed the form of deportatio in insulam. It was attended with confiscation of goods, and involved loss of civitas but not of libertas, §§ 128, 161.

§ 92. The offspring of a wedded mother who was an alien at the date of conception and is a citizen at the date of birth, according

to the general rule of jus gentium, should be born a Roman citizen; but this would contravene the above-mentioned lex Minicia, which enacted that the issue of a marriage is an alien whenever either parent is an alien, § 78.

§ 93. Si peregrinus sibi liberisque suis ciuitatem Romanam petierit, non aliter filii in potestate eius fient, quam si imperator eos in potestatem redegerit; quod ita demum is facit, si causa cognita aestimauerit hoc filiis expedire. diligentius autem exactiusque causam cognoscit de inpuberibus absentibusque; et haec ita edicto diui Hadriani significa*n*tur.

§ 94. Item si quis cum uxore praegnate ciuitate Romana donatus sit, quamuis is qui nascit*ur*, ut supra dixi*mus*, ciu*i*s Romanus sit, tamen in potestate patris non fit; idque subscriptione diu*i* Hadriani significatur; qua de causa qui intellegit uxorem suam esse praegnatem, dum ciuitatem sibi et uxori ab imperatore petit, simul ab eodem petere debet, ut eum qui natus erit in potestate su*a* habeat.

§ 95. Alia causa est eorum qui Latii iure cum liberis suis ad ciuitatem Romanam perueniunt; nam horum in potestate fiunt liberi. qu*od* ius quibusdam peregrinis ciuitatibus datum est uel a populo Romano uel a senatu uel a Cae|sare.

§ 96. ——— aut maius est Lati|um aut minus: maius est Latium, cum et hi qui decuriones leguntur et ei qui honorem aliquem aut magistratum gerunt ciuitatem Romanam

§ 93. If an alien has obtained by petition for himself and his children a grant of Roman citizenship, the children do not fall under the power of the father except by express ordinance of the emperor, which he only makes if, on hearing the facts of the case, he deems it expedient for the interest of the children, and he makes a still more careful and minute inquiry if they are below the age of puberty and absent, as an edict of the Emperor Hadrian intimates.

§ 94. Also if an alien and his pregnant wife receive a grant of Roman citizenship, the child, though a Roman citizen, as above mentioned, is not born in the power of his father according to a rescript of the late Emperor Hadrian; wherefore, if he knows his wife to be pregnant, an alien who petitions the emperor for Roman citizenship for himself and his wife ought at the same time to petition that his son may be subjected to his power.

§ 95. The rule is different for those who with their children are made Roman citizens by right of *Latinity*, for their children fall under their power; this right has been conceded to certain alien states either by the Roman people, or by the senate or by the emperor.

§ 96. The right of Latinity is either greater or lesser. Greater Latinity is the right whereby those who are chosen decuriones or hold some high office or magistracy acquire Roman citizenship: lesser

consecuntur; minus Latium est, cum hi tantum *q*ui magistratum uel honorem gerunt ad ciuitatemRomanam perueniunt: idque conpluribus epistulis principum significatur.

Latinity is when only those who are magistrates or hold high office acquire Roman citizenship, a distinction intimated by several imperial rescripts.

The grant of civitas was either made to communities or to individuals. It was a lucrative source of revenue to the emperors. The fees to be paid were not small, Acts of the Apostles, 22, 28, and the new-made civis was regarded as a manumitted slave of the emperor, and was expected to remember the emperor in his will. The philosophic emperor, Marcus Aurelius, under whom Gaius flourished, granted Roman citizenship to all who were ready to pay the fees, data cunctis promiscue civitas Romana, Aurelius Victor, 16. Antoninus Caracalla, A.D. 212–217, after raising from one-twentieth to one-tenth the tax on manumissions and the testamentary succession and legacy duty, which was only levied on Roman citizens, exhausted for a time this source of revenue by conferring at a stroke Roman citizenship on every free subject of the empire: In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt, Dig. 1, 5, 17. This was not a general manumission of slaves nor an abolition of the status of Latin or alien, but a grant of citizenship to all existing Latins and aliens, imposing in effect a capitation tax on the individuals, and leaving those orders to be again replenished by subsequent manumissions of Latini and dediticii. The value of the privileges of civis Romanus was gradually declining. The political portions of civitas had been extinguished by the establishment of the empire, and Rome was destined at last to undergo the fate she had inflicted on so many other cities. She was sacked by Alaric, king of the Goths, A.D. 410. She was entered by Genseric, king of the Vandals, and, after a sack of fourteen days, left a heap of ruins, A.D. 455. The splendour of the title of civis Romanus was sadly dimmed before Justinian made it acquirable by every form of manumission.

§ 94. Subscriptio was an imperial rescript written under the petition to which it was an answer: a rescript written on a separate document was called epistola. The latter was addressed to public functionaries, the former to private individuals, and by its connexion with the petition enabled a tribunal to which it was submitted to investigate the truth of the allegations on which it was founded. Cf. § 5, comm.; and see Roby, Private Law, Intr. p. 6, n. 2.

The grant of patria potestas by the Emperor to the new-made citizen, § 93, may be assimilated to the legislative grant of patria potestas in adrogatio. Its different effects may be compared with

the incidents of Naturalization and Denization in English law. Naturalization formerly only effected by act of parliament is retrospective, and puts an alien in exactly the same state as if he had been born in the king's ligeance, and his son born before the naturalization may inherit: whereas the issue of a Denizen (an alien born who has obtained ex donatione regis letters patent to make him an English subject) cannot inherit to him, but his issue born after may. Blackstone.

§§ 95, 96. Before the recension of the text by Studemund Gaius was supposed to have defined greater Latinity in this section as the right whereby the magistrates of certain towns acquire the Roman franchise along with their wives and children, and lesser Latinity as the right whereby the magistrates themselves acquire the Roman franchise, but not their wives and children. The distinction made by Gaius between these two kinds of Latinity is not found in any other writer (cf. note to Muirhead's Gaius, h. l.).

The name of a senate in a municipality was ordo decurionum or simply ordo or curia, its members being decuriones or curiales. The office of decurio, which was at one time a coveted distinction, became very burdensome; and in order to make it more acceptable, privileges were from time to time attached to it, as e.g. Latium majus, and in later times legitimatio per oblationem curiae (Inst. 1, 10, 13). (Dig. 50, 2 de decurionibus.)

It is to be noticed that the jus Latii could, according to Gaius, § 95, be constitutionally granted in three ways, either by the people itself (in Comitia), or by the senate (representing the people), or by the Emperor (in whom the power of the people was to a great extent vested).

DE ADOPTIONIBVS.

§ 97. | *Non solum tamen naturales liberi secundum ea quae* | diximus in potestate nostra sunt, uerum et hi quos adoptamus. Inst. 1, 11 pr.

§ 97. Not only natural children are subject, as mentioned, to paternal power, but also adoptive children.

§ 98. Adoptio autem duobus modis fit, aut populi auctoritate, aut imperio magistratus, uel*uti* praetoris. Inst. 1, 11, 1.

§ 98. Adoption is of two forms, adoption by authority of the people and adoption by the executive command of a magistrate, as of the praetor.

§ 99. Populi auctoritate adoptamus eos qui sui iuris sunt; quae species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an uelit eum quem adoptaturus sit

§ 99. Authority of the people is required for the adoption of an independent person, and this form is called adrogation, because the adopter is interrogated whether he wishes to have the

iustum sibi filium esse; et is qui adopta*tur* rogatur an id fieri patiatur; et populus rogatur an id fieri iubeat. imperio magistratus adoptamus eos qui in potestate paren*tum* sunt, siue primum gradum liberorum optineant, qualis est filius et filia, siue inferiorem, qualis est nepos neptis, pronepos proneptis. Inst. 1. c.

person adopted for his lawful son, the person adopted is interrogated whether he thereto consents, and the people (in comitia) is interrogated whether such is its command. The executive command of a magistrate is the proceeding for the adoption of a person subject to the power of an ascendent, whether a descendent in the first degree, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter.

§ 100. Et quidem illa adoptio quae per populum fit nusquam nisi Romae fit; at haec etiam in prouinciis apud praesides earum fieri solet.

§ 100. Adoption by vote of the people (in comitia) can only be solemnized at Rome, the other process is usually effected in the provinces in the court of the president.

§ 101. Item per populum feminae non adoptantur, nam id magis placuit; apud p*rae*-*torem* uero uel in prouinciis apud proconsule*m* legatumue etiam feminae solent adoptari.

§ 101. Adoption by vote of the people is inapplicable to females, as has finally been ruled; but females may be adopted by the other mode of adoption, at Rome in the court of the praetor, in provinces of the people it is usually effected in the court of the proconsul, in provinces of the emperor in the court of the legate.

§ 102. Item inpuberem apud populum adoptari aliquando prohibitum est, aliquando permissum est; nunc ex epistula optimi imperatoris Antonini quam scripsit pontificibus, si iusta causa adoptionis esse uidebitur, cum quibusdam condicionibus permissum est. apud praetorem uero et in prouinciis apud proconsulem legatumue cuiuscumque aetatis⟨*personas*⟩ adoptare possumus. Inst. 1, 11, 3.

§ 102. The legislative adoption of a child below the age of puberty by vote of the people was at one time prohibited, at another permitted; at the present day, by the epistle of the Emperor Antoninus addressed to the pontifices, on evidence of a just cause of adoption, it is permitted, subject to certain conditions. In the court of the praetor at Rome, in the court of the proconsul in a province of the people, and in the court of the legate in a province of the emperor, a person of any age may be adopted.

§ *103*. *Illud* utriusque adop*tionis* commune est, qu*od* et *hi qui* generare non possunt,

§ 103. Both forms of adoption agree in this point, that persons incapable of procreation by

quales sunt spadones, adoptare possunt. Inst. 1, 11, 9.

natural impotence are permitted to adopt.

§ 104. Feminae uero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent. Inst. 1, 11, 10.

§ 104. Women cannot adopt by either form of adoption, for even their natural children are not subject to their power.

§ 105. Item si quis per populum siue apud praetorem uel apud praesidem prouinciae adoptauerit, potest eundem alii in adoptionem dare.

§ 105. He who has adopted a person either by the vote of the people or by the authority of the praetor or of the president of a province, can transfer his adoptive son to another adoptive father.

§ 106. *Sed* et illa quaesti*o*, an minor natu maiorem natu adoptare possit, utriusque adoptionis commun*is* est.

§ 106. Whether a younger person can adopt an older is a disputed point in both forms of adoption.

§ 107. Illud proprium est eius adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, sed etiam liberi eius in eiusdem fiunt potestate tamquam nepotes. Inst. 1, 11, 11.

§ 107. It is peculiar to adoption by the vote of the people that children in the power of the person adrogated, as well as their father, fall under the power of the adrogator, assuming the position of grandchildren.

Adrogation, or the adoption of an independent person (paterfamilias), reducing him to a dependent status (filiusfamilias), was a legislative act of the Comitia Curiata ; but though, as representing the people, this assembly was legally omnipotent, it was unconstitutional to deprive a person either of the citizenship or of domestic independence without his own consent. We learn from Cicero the formula by which this assent was ascertained. De Domo, 29. 'As it is an immemorial rule of law that no citizen of Rome shall be deprived of the independent position of paterfamilias or of citizenship against his will, as you have had occasion of learning by your own experience, for I suppose that, illegal as your adrogation was in all points, you at least were asked whether you consented to become subject to the adrogator's power of life and death as if you were his son ;—if you had opposed or been silent, and the thirty Curiae had nevertheless passed the law, tell me, would their enactment have had any binding force?' The form in which the law was proposed to the legislative assembly is given by Gellius, 5, 19. 'Adrogation is the subjection of an independent person with his own consent to the power of a superior, and is not transacted in the dark or without

investigation. The Comitia Curiata, at which the College of Pontiffs is present, are convened, and examine whether the age of the adrogator does not rather qualify him for the natural procreation of children, and whether the estate of the adrogatus is not the object of fraudulent cupidity, and an oath, said to be framed by Q. Mucius, the high pontiff, has to be taken by the adrogator. . . . Adrogation, the name given to this transmit into a strange family, is derived from the interrogation of the legislative body, which is in the following form: 'May it please you to will and command that L. Valerius shall be as completely by law and statute the son of L. Titius as if he were born of L. Titius and his wife, and that L. Titius shall have power of life and death over L. Valerius as a father has over his son. Do you will and command as I have said, Quirites?' Those who voted in affirmation of the measure proposed said (at least in other similar assemblies): Uti rogas; those who voted against it said: Antiquo. Women were originally incapable of being adrogated, § 101, because they were incapable of appearing in the Comitia Curiata, Quoniam cum feminis nulla comitiorum communio est, Gellius, ibid.; but this incapacity vanished as soon as the lex Curiata, as form of adrogation, was superseded by imperial rescript (principale rescriptum), Gaius in Dig. 1, 7, 21. Women, being incapable of exercising parental power, could not, properly speaking, adrogate, § 104; but they were permitted, under Diocletian A. D. 291, by quasi adrogation to establish the same legal relation as existed between a mother and her natural children, Cod. 8, 48, 5; Inst. 1, 11, 10. An adrogator was usually required to be sixty years old, Dig. 1, 7, 15, 2, and to be eighteen years (plena pubertate) older than adrogatus, Inst. 1, 11, 4. Originally a youth must have attained the age of puberty before he could be adrogated, § 102, and Gellius, ibid.: Sed adrogari non potest nisi jam vesticeps . . . quoniam tutoribus in pupillos tantam esse auctoritatem potestatemque fas non est, ut caput liberum fidei suae commissum alienae ditioni subiciant. 'A youth cannot be adrogated before he has assumed the toga virilis, because a guardian has no authority or power to subject an independent person, with whose charge he is entrusted, to the domination of a stranger.' The purple-edged praetexta was generally laid aside by boys along with the bulla aurea which they wore round their neck, on the first Liberalia, the 17th March, Ovid, Fasti, 3, 771, after the completion of their fourteenth year. Females did not lay aside the praetexta till their marriage. Antoninus Pius permitted the adrogation of youths below the age of puberty (impubes, investis) under certain conditions; e.g. the adrogator entered into a stipulation, originally with a public slave, in later times with a public notary (tabularius), in the event of the

death of adrogatus before the age of puberty, to restore his estate to his natural heirs, and, in the event of emancipation, to adrogatus himself: and adrogatus became entitled to a fourth part of the estate of adrogator (called quarta Antonini), of which he could not be deprived by disinherison or by unmerited emancipation, § 102; cf. Inst. 1, 11, 3. In the time of Justinian the adrogator only acquired a usufruct for life in the property, subject to which the adrogatus was owner of it; that is to say, the property of adrogatus was transformed by adrogation into peculium adventicium. Cf. 3, 84, comm.

The form of simple adoption is explained below, § 134, under the head of dissolution of patria potestas, for as patria potestas is vested by adoption in the adoptive father, so it is divested from the natural father.

The effect of adoption was much reduced by a constitution of Justinian. If the adoption was by an ascendent, maternal or paternal, it retained its old character: but if it was by a stranger it neither created nor extinguished patria potestas; it did not transfer the adopted son from his old family into a new family, and therefore it neither destroyed nor created any tie of agnation: its only effect was to give to the adopted son, in the event of intestacy, a claim against the estate of the intestate adoptive father; Cod. 8, 47, 10; Inst. 1, 11, 2 and 3, 1, 14.

DE MANV.

§ 108. *Nunc de his personis uideamus quae in manu nostra sunt. quod* | et ipsum ius proprium ciuium Romanorum est.

§ 108. Let us next proceed to consider what persons are subject to the hand, which also relates to law quite peculiar to Roman citizens.

§ 109. Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum co*n*ueniunt.

§ 109. Power is a right over males as well as females: hand relates exclusively to females.

§ 110. Olim itaque *t*ribus modis in manum conueniebant, usu farreo coemptione.

§ 110. In former days there were three modes of becoming subject to hand, use, confarreation, coemption.

§ 111. Usu in manum conueniebat quae anno continuo nupta perseuera*bat*; *quia* enim ueluti annua possessione usucapiebatur, in familiam uiri trans*i*bat filiaeque locum optinebat. itaque lege XII tabularum cau-

§ 111. Use invested the husband with right of hand after a whole year of unbroken cohabitation. Such annual possession operated a kind of usucapion, and brought the wife into the family of the husband, where it gave her the

tum est, ut si qua nollet eo modo in manu*m* mariti conuenire, ea quotannis trinoctio abesset atque eo modo ⟨*usum*⟩ cuiusque anni interrumperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est.

status of a daughter. Accordingly, the law of the Twelve Tables provided that a wife who wished to avoid subjection to the hand of the husband should annually absent herself three nights from his roof to bar the annual usucapion: but the whole of this law has been either partly abolished by statute, or partly obliterated by mere disuse.

§ 112. Farreo in manu*m* conueniunt per quoddam genus sacrificii, quod Ioui Farreo fit; in quo farreus panis adhibetur, unde etiam con*farre*atio dic*i*tur; conplura praeterea huius iuris ordinandi gratia cum certis et sollemnibus uerbis praesentibus decem testibus aguntur et fiunt. quo*d* ius etiam nostris temporibus in usu est; nam flamines maiores, id est Diales Martiales Quirinales, item reges sacrorum nisi ex farreatis nati *n*on leguntur; ac ne ipsi quidem sine confarreatione sacerdot*i*um habere possunt.

§ 112. Confarreation, another mode in which subjection to hand originates, is a sacrifice offered to Jupiter Farreus, in which they use a cake of spelt, whence the ceremony derives its name, and various other acts and things are done and made in the solemnization of this disposition with a traditional form of words, in the presence of ten witnesses: and this law is still in use, for the functions of the greater flamens, that is, the flamens of Jove, of Mars, of Quirinus, and the duties of the ritual king, can only be performed by persons born in marriage solemnized by confarreation. Nor can such persons themselves hold a priestly office if they are not married by confarreation.

§ 113. Coemptione uero in manum conueniunt per mancipatione*m*, *id est* per quandam imaginariam uenditionem; nam adhibitis non m*i*nu*s* quam V testibus ciuibus Romanis puberibus, item libripend*e*, emit *is* mulierem, cuius in manum conuenit.

§ 113. In coemption the right of hand over a woman attaches to a person to whom she is conveyed by a mancipation or imaginary sale: for the man purchases the woman who comes into his power in the presence of at least five witnesses, citizens of Rome above the age of puberty, besides a balance holder.

§ 114. P*otest* autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo; scilicet aut matrimonii causa facta coemptio dicitur aut fiduciae; quae enim cum marito suo facit coe*m*ptionem, ⟨*ut*⟩ apud eum filiae

§ 114. By coemption a woman may convey herself either to a husband or to a stranger, that is to say there are two forms of coemption, matrimonial and fiduciary. A coemption with a husband in order to acquire the status of daughter in his house is a matri-

loco sit, dicitur matrimonii causa fecisse coemptionem; quae uero alterius rei causa facit coemptionem aut cum uiro suo aut cum extraneo, ueluti tutelae euitandae causa, dicitur fiduciae causa fecisse coemptionem:

monial coemption: a coemption for another purpose, whether with a husband or with a stranger, for instance, for avoiding a guardianship, is a fiduciary coemption.

§ 115. quod est tale: si qua uelit quos habet tutores *d*eponere et alium nancisci, illis *auc*toribus coemptionem facit; deinde a coemptionatore remancipata ei cui ipsa uelit, et ab eo uindicta manumissa incipit eum habere tu*t*orem, ⟨*a*⟩ quo manumissa est; qui tutor fiduciarius dicit*ur*, sicut inferi*us* app*a*re*b*it.

§ 115. This is accomplished by the following process: the woman who desires to set aside her present guardians and substitute another makes a coemption of herself to some one with their sanction: thereupon the party to this coemption remancipates her to the person intended to be substituted as guardian, and this person manumits her by the form of vindicta, and in virtue of this manumission becomes her guardian, being called a fiduciary guardian, as will hereafter be explained.

§ 115 *a*. Oli*m* etiam testamenti faciendi gratia fiduciar*i*a fiebat coemptio; tunc enim non al*iter* feminae testamenti faciendi ius habebant, exceptis quib*us*dam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent: sed hanc necessitatem coemptionis faciendae ex auctoritate diui Ha|driani senatus remisit.

§ 115 *a*. In former times testamentary capacity was acquired by fiduciary coemption, for no woman was competent to dispose of her property by will, with the exception of certain persons, unless she had made a coemption, and had been remancipated and then manumitted: but this necessity of coemption was abolished by a senatusconsult made on the motion of Hadrian, of divine memory.

§ 115 *b*. ——— | femina——— fi|duciae causa *cum uiro suo f*ecer*it* coemp*tionem*, nihilo minus filiae loco incipit esse; nam si omnino qualibet ex causa uxor in manu uiri sit, placu*it* eam filiae iura nancisci.

§ 115 *b*. Even if a woman makes only a fiduciary coemption with her husband, she acquires the status of his daughter, for it is held that from whatever cause a woman is in the hand of her husband, she acquires the position of his daughter.

In early Roman law a woman on marriage necessarily passed out of her own agnatic family into that of her husband, taking the place of a filiafamilias in it. If her husband was paterfamilias, she came into his hand, if he was filiusfamilias into that of his father. This power (manus) was the same in its nature as patria potestas.

By manus the husband, or the husband's father, had power of life and death over the wife, Livy, 39, 18; Tac. Ann. 13, 32; and all the property of the wife, even more absolutely than by the common law of English jurisprudence, vested in the husband or his paterfamilias, 2 § 98.

The patriarchs of the Roman nation could probably not conceive of the conjugal union as disjoined from manus. Yet at a very early period of Roman history these were recognized as separable, and in later times they were almost universally dissociated, and wedlock was unaccompanied by manus. In a marriage celebrated without confarreation and without coemption before the expiration of the first year of cohabitation, there was civil wedlock without manus, and the Twelve Tables provided a method (trinoctio abesse) by which this state could be indefinitely prolonged, § 111: and as soon as gentile marriages were recognized by the law the Romans were still more familiarized with the spectacle of lawful matrimony without manus. As the ages advanced the wife acquired more and more independence; manus was almost obsolete in the time of Gaius, and it has quite vanished from the legislation of Justinian. (For a detailed account of the law of marriage see Sohm, pp. 470–498.)

Confarreation was a form of marriage which made the issue eligible for certain high sacerdotal functions, and may therefore be regarded as characteristic of the patrician caste. Originally it probably produced marital power in its full extent; but when Augustus, B.C. 10, after a vacancy of seventy-five years, renewed the priesthood of Jove (flaminium diale) he limited by statute the legal effect of confarreation in that particular instance, § 136; and Tiberius, A.D. 23, extended the limitation to all future cases of confarreation, Tac. Ann. 4, 16. Henceforth it only operated a change of family in respect of sacred rites (sacra): the woman ceased to have the domestic gods and domestic worship of her father, and took in exchange the domestic gods and domestic worship of her husband. But in secular matters her family was unchanged: she remained, if filiafamilias, subject to patria potestas, and did not become quasi filiafamilias in the household of her husband: her old ties of agnation in her father's family were not snapped, and no new ties of agnation in her husband's family were acquired. Divorce (diffarreatio, Festus, s.v.) was almost impossible, and this indissolubility of the connexion contributed to the unpopularity of confarreatio. Moreover, it was a religious ceremonial, requiring the presence of the pontifex maximus and flamen dialis, and as such it vanished with vanishing paganism. The ten witnesses apparently represented the *ten curiae* of which the tribe was composed, or the ten gentes of which the curia was composed, or, if the decimal division continued further, the ten families of which the gens was composed.

The purchase of the wife by the husband, a widespread custom in a primitive state of society, was no doubt one of the ways in which Roman marriage originated. The exact nature of Coemption, in consequence of the defective state of the Veronese manuscript, must, however, remain a mystery. Coemption was a form of mancipation, § 113, but in virtue of the provision of the Twelve Tables, Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto, the nature of every mancipation depended on the mancipii lex, the accompanying nuncupation or verbal declaration of its condition, intentions, purposes; as in English conveyancing the nature of a grant is limited and determined by the habendum and tenendum of the deed. We are informed that in coemption, the formula was not the same as in other mancipations, § 123, but we are not informed what it was. Even in Cicero's time many advocates were ignorant of the legal effect of a coemption because they were ignorant of the precise terms of the formula in which it was concluded, De Orat. 1, 56. The word itself may suggest a conjecture that it was a conveyance of the husband to the wife as well as of the wife to the husband; and this is supported by Servius on Georgics, 1, 34, and Isidorus, 5, 24, no great authorities, but who quoted apparently from Ulpian: 'An ancient nuptial form wherein husband and wife made a mutual purchase, to bar the inference that the wife became a slave.' Plutarch informs us that the wife asserted her equality by the terms, Ubi tu Caius, ego Caia, Quaest. Rom. 28: 'Where thou art master, I am mistress.' Boethius on Cicero, Topica, 3, 14, quoting from Ulpian, says: 'The man and woman interrogated one another. He asked her if she wished to be mother of his household; she answered, Yes. She asked him if he wished to be father of her household; he answered, Yes. And thus the woman passed into the hand of the man, and was called the mother of his household, with the status of filiafamilias.' According to Cicero, the wife was only called materfamilias when subject to hand: Genus est uxor; ejus duae formae; una matrumfamilias, eae sunt, quae in manum convenerunt, altera earum quae tantummodo uxores habentur, Top. 3, 14. Gellius says the same, 18, 6, 7: Tradiderunt matremfamilias appellatam esse eam solam quae in mariti manu mancipioque aut in ejus, in cujus maritus manu mancipioque esset. Boethius (in Cic. Top. 3, 14) further limits the title to a wife who has become subject to manus by coemption: Quae autem in manum per coemptionem convenerant, hae matresfamilias vocabantur, quae vero usu et farreatione, minime, ibid. However this may have been, in one sense the name was a misnomer, for a wife subject to hand was not sui juris (materfamilias), but alieni juris (filiafamilias): and that materfamilias denoted a woman sui juris, whether married or unmarried, as opposed to

a filiafamilias or woman alieni juris, appears from Ulpian (4, 1): Sui juris sunt familiarum suarum principes, id est paterfamiliae itemque materfamiliae. (See Muirhead's Roman Law, App. B.)

If the wife was subject to the power of her father, she required his sanction before she could make a coemption with her husband. If the wife was independent of parental control, she required the sanction of her guardians, who under the old law would have been her nearest agnates.

Coemption was sometimes employed for other purposes than matrimony, and was then called fiduciary coemption. Sometimes the intention was to extinguish the obligation of onerous sacred rites attached to the estate of an heiress: Jure consultorum ingenio senes ad coemptiones faciendas interimendorum sacrorum causa reperti sunt, Cic. Pro Murena, 12, § 27. 'Juristic ingenuity invented coemptions with aged men for extinguishing sacred rites.' Savigny (Verm. Schr. 1, 190) gives the following conjectural explanation of the process. The obligation to the sacra belonged to the Quiritary ownership of the universitas of the woman's estate. This, by the effect of coemption, vested in the coemptionator, an old man approaching dissolution (senex coemptionalis), with whom a fictitious marriage was contracted, and who took the estate as universal successor. He forthwith dismissed the woman from his manus by remancipation and manumission: and then, according to covenant, restored to her the estate in portions; that is, released from the ritual obligations, which only attached to the universitas. On his death, as Quiritary owner of the empty universitas, the obligation to the rites was extinguished: for the succession (hereditas) to the coemptionator did not pass to the woman, as she by remancipation had ceased to be [such was the hypothesis of Savigny before the discovery of Gaius: instructed by Gaius we must rather say, as mere fiduciary coemption had not the effect of making her] his filiafamilias and sua heres. The phrase senex coemptionalis denotes a slave. From which it may be inferred that a slave, useless for any other purpose, and therefore very cheap, was sometimes bought and manumitted to serve as coemptionator. In such a case the whole transaction would be very inexpensive, if not very decorous. This mode of getting rid of sacred rites is compared by Ihering, § 58, with the institution of a slave as heir to bear the infamy of bankruptcy instead of the deceased testator, 2 § 154. Universal succession was an institution which Roman law only admitted in certain cases, 2 § 98, including the cases of Manus and Adrogatio. If universal succession was required for the purpose of extinguishing the obligation to sacred rites attaching to the estate of an heiress, we might have supposed that Adrogatio would have been a less offensive

mockery than a fictitious marriage (fiduciary coemption); adrogatio, however, was inapplicable, because, as we have seen, up to a late period of Roman law women were incapable of being adrogated. Moreover, the Pontifices, who had a veto on adrogations, were not likely to lend themselves readily to the extinction of sacred rites. (Comments of other modern writers on this subject are noticed in Roby's Roman Private Law, 1, 71, n. 1.)

At other times Coemption was employed to enable a woman to select a guardian, §§ 115, 195 *a*. Cic. Pro Murena, 12 § 27. 'There are many wise legal provisions that juristic ingenuity has defeated and perverted. All women on account of their weakness of judgement were placed by our ancestors under a guardian's control: jurists invented a kind of guardian subject to female dictation.' (Cf. Sohm, 103, n. 2.)

The latest employment of Coemption enabled a woman to break the ties of agnation and thus acquire testamentary capacity, § 115 *a*; Cic. Top. 4, 18. The coemptionator (party to the coemption) in virtue of the manus thereby acquired was able, and by a fiducia or trust was bound, to sell the woman into bondage as if she were filiafamilias: accordingly he remancipated her to a third person, who by manumitting her in accordance with another fiducia became her patron, and as patron, in accordance with the Twelve Tables, §§ 165, 166, her statutory guardian (tutor legitimus), and, as having acted under a fiducia, her fiduciary guardian, § 115. It may occur to us that as coemptio required the sanction of a father or guardian, this process could not be of much use in getting rid of a guardian or defeating the claims of agnatic guardians to a woman's intestate succession; but it must be remembered that the nearest agnate, who alone was heir and guardian, was a variable person, and that a given nearest agnate might be not indisposed to allow a woman to acquire the free disposition of her property and to defeat the claims of those who, after his death, would be nearest agnates and presumptive heirs. At all events, however indisposed the guardian might be to such a course, a period at last arrived when the auctoritas of the guardian, though still required as a formality, could be extorted, if not yielded voluntarily, by appeal to the magistrate, § 190.

Agnatic guardianship of female wards was abolished by a lex Claudia, § 171, and thus the woman would be free from the control of an interested guardian in the disposition of her property during her lifetime. She would still however have had little more than a life interest until she acquired the power of testation. For when wills could be only executed in the comitia, 2 § 101, she would be excluded from testation, as well as from adrogation, by exclusion from the comitia: and after the introduction of the mancipatory will she

was still barred by her agnates' indefeasible claims to her reversion. Agnation itself, however, was defeasible by means of coemptio and remancipatio and the consequent capitis minutio; and when the auctoritas of the guardian for these proceedings could be extorted, § 190, the woman had practically acquired power of testation, although its exercise was hampered by a tedious formality, which was not abolished by the emperor Claudius when he abolished agnatic guardianship. It was not till the senatusconsult of Hadrian that the rupture of the ties of agnation by means of coemptio ceased to be necessary to the validity of a woman's will, § 115 *a*; 2 §§ 112, 118; though it had probably been previously a mere formality (the woman having power to extort at pleasure the auctoritas of the agnatic guardian) even before the time of Claudius. As we learn from the text coemption had not been required previously in the case of certain privileged women. Cf. §§ 145, 194; 3 § 44; Ulp. 29, 3.

§ 114. Fiducia was a declaration of the trusts of a mancipation, by which the party to whom the mancipation was made undertook to remancipate under certain conditions. Besides its use in coemption, it was employed, as we shall see presently, in emancipation and adoption, and was the earliest form of constituting the contracts of deposit and mortgage, 2 §§ 59, 60; 3 §§ 90, 91, comm.

The pactum fiduciae, or agreement by which the conditions or trusts were defined, must not be identified with nuncupatio. Nuncupatio forms an integral part of Mancipatio, and what was declared in it would constitute a title under the law of the Twelve Tables. Pactum fiduciae, on the other hand, never coalesces with Mancipatio, but remains a separate adjunct, originally only morally binding on the transferee, but afterwards forming an obligation of jus gentium, and affording ground to support a bonae fidei actio. Herein Mancipatio is contrasted with Tradition and the dispositions of natural law. Conventions accompanying Tradition unite with it, and form a single consolidated disposition; and the pacts annexed (pacta adjecta) to any contract of natural law (venditio, conductio, mandatum, &c.) become integral parts thereof, and are enforced by the action brought on the principal contract. Stipulatio, as a civil disposition, seems to have originally resembled Mancipation in this respect: at least it was a late period of the law when the rule was clearly established that: Pacta incontinenti facta stipulationi inesse creduntur, Dig. 12, 1, 40, i. e. Pacts made contemporaneously with a stipulation are deemed to be portions of the stipulation. Savigny, § 268. It is true that a Pactum adjectum respecting interest and annexed to the gentile disposition Mutuum could not be enforced by an action brought upon the Mutuum: but that was a consequence of the nature of the action (condictio certi) whereby Mutuum was enforced, and which

could not embrace any sum beyond the original subject of the Mutuum; 3 §§ 90, 91, comm.

DE MANCIPIO.

§ 116. Superest ut exponamus quae personae in mancipio sint.

§ 116. It remains to examine what persons are held in mancipation.

§ 117. Omnes igitur liberorum personae siue masculini siue feminini sexus quae in potestate parentis sunt mancipari ab *hoc eodem* modo possunt, quo etiam serui mancipari possunt.

§ 117. All children, male or female, in the power of their father are liable to be mancipated by their father just as his slaves may be mancipated.

§ 118. Idem iuris est in earum personis quae in manu sunt; | ——— coemptionatoribus eodem modo possunt |———apud coemptionatorem fi|liae loco sit ———nupta sit,——— nihilo minus etiam quae ei nupta non *sit* nec ob id filiae loco sit, ab eo mancipari possit.

§ 118. A woman in the hand is subject to the same mode of alienation, and may be mancipated by the person who has acquired her by coemption just as a daughter may be mancipated by her father: and although the acquirer of her by coemption otherwise than for the purpose of marriage has not the power of a father over her, nevertheless, though he is not her husband, and therefore has not the status of a father, he can dispose of her by mancipation.

§ 118 *a*. Plerumque ⟨*uero tum*⟩ solum et a parentibus et a coemptionatoribus mancipantur, cum uelint parentes coemptionatoresque ⟨*ex*⟩ suo iure eas personas dimittere, sicut inferius euidentius apparebit.

§ 118 *a*. Almost the sole occasion of mancipation by a parent or by the acquirer of a woman by coemption is when the parent or acquirer by coemption designs to liberate the person mancipated from his lawful control, as will presently be more fully explained.

§ 119. Est autem mancipatio, ut supra quoque diximus, *i*maginaria quaedam uenditio; quo*d* et ipsum ius proprium ciuium Romanorum est, eaque res ita agitur: adhibitis non minus qu*am* quinque testibus ciuibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, *aes*

§ 119. Mancipation, as before stated, is an imaginary sale, belonging to that part of the law which is peculiar to Roman citizens, and consists in the following process: in the presence of not fewer than five witnesses, citizens of Rome above the age of puberty, and another person of the same condition, who holds a bronze balance in his hands and is called the balance holder, the alienee holding a bronze ingot in his hand, pronounces the

tenens ita dicit: HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO *I*SQVE MIHI EMPTVS ESTO HOC AERE AENEAQVE LIBRA; deinde aere percutit libram idque aes dat ei a quo mancipio accipit quasi pretii loco.

following words: THIS MAN I CLAIM AS BELONGING TO ME BY RIGHT QUIRITARY AND BE HE (or, HE IS) PURCHASED TO ME BY THIS INGOT AND THIS SCALE OF BRONZE. He then strikes the scale with the ingot, which he delivers to the mancipator as by way of purchase money.

§ 120. Eo modo et seruiles et liberae personae mancipantur; animalia quoque quae mancipi sunt, quo in numero habentur boues, equi, mul*i*, asini; item praedia tam urbana qu*am* rustica quae et ipsa mancipi sunt, quali*a* sunt Italica, eodem modo solent mancipari.

§ 120. By this formality both slaves and free persons may be mancipated, and also such animals as are mancipable, namely, oxen, horses, mules, and asses: immovables also, urban and rustic, if mancipable, such as Italic lands and houses, are aliened by the same process.

§ 121. In eo solo praed*i*orum mancipatio a ceterorum mancipatione differt, quod personae seruiles et liberae, item animalia quae mancipi sunt, nisi in praesentia sint, mancipari non possunt; adeo quidem, ut eum ⟨*qui*⟩ mancipio ac*c*ipit, adprehendere id ipsum quod e*i* mancipio da*tur* necesse sit; unde etiam mancipatio dici*tur*, quia manu res capitur; praedia uero absentia solent mancipari.

§ 121. The only point wherein the mancipation of land and buildings differs from the mancipation of other things is this, that mancipable persons, whether slaves or free, and animals that are mancipable, must be present to be mancipated: it being necessary that the alienee should grasp the object to be mancipated with his hand, and from this manual prehension the name of mancipation is derived; whereas land and buildings may be mancipated at a distance from them.

§ 122. Ideo autem aes et libra adhibetur, quia olim aereis tantu*m* nummis utebantur, et erant asses, dupundii, semisses, quadrantes, nec ullus aureus uel argenteus nummus in usu erat, sicut ex lege XII tabularum intellegere possumus; eorumque nummorum uis et potestas non | in numero erat sed in pondere———as|ses librales erant, et dupundii——|; unde etiam dupundius dictu*s est quasi duo* pondo, quod nomen *adhuc* in usu retine*tur*. semis*ses quoque* et quadrante*s* pro

§ 122. The reason of using a bronze ingot and a weighing scale is the fact that bronze was the only metal used in the ancient currency, which consisted of pieces called the as, the double as, the half as, the quarter as, and that gold and silver were not used as media of exchange, as appears by the law of the Twelve Tables: and the value of the pieces was not measured by number but by weight. Thus the as was a pound of bronze, the double as two pounds, whence its name (dupondius), which still survives; while the half as and quarter as

rata scilicet portione ad pon|dus examinati erant.——qui dabat *olim* | pecuniam, non numerabat eam, sed appendebat; unde serui quibus permittitur administratio pe|cuniae dispensatores appellati sunt et——|

were masses defined by weighing those respective fractions of a pound. Accordingly, money payments were not made by tale, but by weight, whence slaves entrusted with the administration of money have been called cashiers.

§ 123. ——coemptio|—— a quidem quae coem|ptionem fac —— seruilem condici|onem a——| mancipa*t*i mancipataeue seruorum loco con|stituuntur, adeo quidem, ut ab eo cuius in mancipio sunt neque heredita*tem* neque legata aliter capere poss*i*nt, quam ⟨*si*⟩ simul eodem testamento liberi esse iubean*tur* sicut *i*uris est in persona seruorum. sed differentiae ratio manifest*a* es*t*, cum a parentibus et a coemptionatoribus isdem uerbis mancipio accip*iantur* quibus serui; quod non similiter *fit* in coemptione.

§ 123. If it is asked in what respect coemptive conveyance differs from mancipation, the answer is this, that coemption does not reduce to a servile condition, whereas mancipation reduces to so completely a servile condition that a person held in mancipation cannot take as heir or legatee under the will of the person to whom he is mancipated, unless he is enfranchised by such will, thus labouring under the same incapacity as a slave: the reason too of the difference is plain, as the form of words employed in mancipation by a parent or previous acquirer by coemption is identical with that used in the mancipation of slaves, but it is not so in coemptive conveyance.

In what respects did domestic bondage (mancipium or mancipii causa) differ from slavery (servitus)? Bondage was an institute of jus civile, slavery an institute of jus gentium, § 52. Bondage was the result of mancipation by a parent or coemptionator, and only a Roman citizen was capable of becoming a bondsman. The proprietor has possession of the slave, the lord has no possession of the bondsman, 2 § 90. The bondsman was civis Romanus, though what became of his political capacities during his bondage is uncertain; and he was liber, though alieni juris; he was free in respect of the rest of the world, he was only a bondsman in respect of the person in whose mancipium he was. Thus the status of mancipium was relative; a man could only be in mancipio in relation to a given domestic lord: whereas the status of slavery was absolute; a man might be a slave without an owner (servus sine domino): for instance, a person condemned for a capital crime, who was called the slave of punishment (servus poenae, Inst. 1, 12, 3), or a slave abandoned (derelictus) by his owner. Accordingly, falling into servitus was maxima capitis diminutio, while falling into man-

cipii causa was minima capitis diminutio, § 162. The bondsman had no proprietary rights against his superior, 2 § 86, but he had some of the primordial rights; for instance, he could sue his superior for outrage, § 141 ; and he was capable of civil wedlock and could beget Roman citizens, though during his bondage his patria potestas was in abeyance, § 135. Release from bondage, as from slavery, was by manumission, § 138, and the manumitter became the patron of the released person, §§ 166, 195 *a*, but the manumitted bondsman became ingenuus, whereas the manumitted slave became libertinus. Bondage did not exist in the time of Justinian.

§ 119. The libripens must not be dumb, Ulpian, 20, 7: probably because he had to utter the formula preserved by Festus, Rauduseulo libram ferito, i. e. to invite the emptor to strike the scale with the ingot, in order to show by the ring that the metal was genuine. Ihering, § 46, n. 708.

§ 120. Praedia Italica. Under the first emperors the body of the Roman world consisted of three members, the imperial city, Rome, Italy, and the provinces, the two former being highly privileged in comparison with the third. After the Social War, 91–88 B.C., all Italy had acquired Roman citizenship, but Italic soil was not a purely local appellation, as jus Italicum was conceded to many provincial cities. Jus Italicum, or Italian privileges, implied (1) a free municipal constitution with elective magistrates (generally called duumviri juri dieundo) possessed of independent jurisdiction; and, what was still more important, (2) immunity from direct taxation, whether in the form of capitation tax (tributum capitis), imposed on all who were not holders of land (tributarii), or in the form of land tax (tributum agri), imposed on holders of land (possessores), and paid in provinces of the people to the aerarium under the name of stipendium, in provinces of the emperor to the fiscus under the name of tributum, 2 § 21. Italic soil was (3) subject to Quiritary ownership (dominium ex jure Quiritium) and acquirable and transferable by usucapion and mancipation. Under the later emperors, as early as the time of Diocletian, the Roman world was equalized, not by the elevation of the depressed members, but by depression of those formerly favoured: Italy was shorn of her privileges, and all the empire became provincial.

§ 122. Chemical analysis shows that the aes of which Roman coins consisted was bronze, a mixture of copper (cuprum), tin, and lead. [English bronze is an alloy composed of ninety-five parts of copper, four parts of tin, and one part of zinc.] Brass, a mixture of copper and calamine (cadmeia) or zinc, was called orichalcum. Silver currency was first introduced B. C. 269. The primitive system of currency was everywhere currency by weight, and every system

of coinage was originally identical with a system of weights, the unit of value being the unit of weight of some selected metal (Jevons, Money, ch. 9). The pieces of which a currency by weight consists are not properly coins, for coins are ingots of which the weight and fineness are certified by the integrity of the designs impressed upon the surfaces of the metal (ibid. ch. 7). Money is legal tender (Mill, Pol. Econ. 12, 7). Legal tender is that which must be tendered by the debtor and accepted by the creditor in discharge of a debt; e.g. in England silver coin is a legal tender only to the amount of forty shillings in any one payment, bronze coins are a legal tender only to the aggregate amount of one shilling. Bank of England notes are a legal tender everywhere in England but at the bank, i.e. are there convertible into gold.

§ 123. As coemptio was a form of mancipatio, how does it happen that manus, the result of coemptio, differs from mancipium, the result of mancipatio? Because, Gaius answers, the formula of words used in the mancipatio that entered into coemptio was specifically different from the formula employed on other occasions of mancipation.

QVIBUS MODIS IVS POTESTATIS SOLVATVR.

§ 124. Videamus nunc quomodo *hi* qui alieno iuri *subi*ecti sunt eo iure liberentur.

Inst. 1, 12 pr.

§ 125. Ac prius de his dispiciamus qui in potestate sunt.

§ 126. Et quidem seru*i quem*admodum potestate liberen*tur*, ex his intell*eg*ere possumus quae de seruis manumittend*is* *su*perius exposuimus.

Inst. l. c.

§ 127. Hi uero qui *in potestate pa*rentis sun*t, mortuo eo sui iuris fiunt. sed hoc di*stinctionem recipit; nam *mortuo pat*re san*e* omni modo filii filiaeue sui iuris efficiunt*ur*; mortuo uero auo *non omni* modo *nepotes nept*esue *sui i*uris *fiunt, sed ita, si post mortem aui* in patris sui potestatem recasuri non *sunt*. *ita*que si moriente auo *pater eorum et uiuat et in*

§ 124. Let us now examine the modes whereby persons dependent on a superior are freed from their dependence.

§ 125. And, first, let us consider persons subject to power.

§ 126. How slaves are liberated may be intelligible from what we have explained above about servile manumission.

§ 127. Children under paternal power become independent at the parent's death, subject, however, to this reservation: the death of a father always releases his sons and daughters from dependence: the death of a grandfather only releases his grandchildren from dependence, provided that it does not subject them to the power of their father: for if at the death of the grandfather the father is alive and in his power, the grand-

potestate patris ⟨*sui*⟩ fuer*it*, tunc post ob*itum aui in patris* sui potestate fiunt; si uero is, quo tempore au*us* moritur, aut iam mor*tuus est aut* exiit de potestate ⟨*patris, tunc hi, quia in potestatem*⟩ eius cadere non possunt, sui *i*uris fiunt.

Inst. 1. c.

children, after the grandfather's death, are in the power of the father; but if at the time of the grandfather's death the father is dead or not subject to the grandfather, the grandchildren will not fall under his power, but become independent.

§ 128. Cum autem is cui ob aliquod maleficium ex lege Cornelia aqua et igni interdicitur ciuitatem Romanam amittat, sequitur ut, qui*a* eo modo ex numero ciuium Romanorum tollit*ur*, proinde ac mortuo eo desinant liberi in potest*ate* eius esse; nec enim ratio patitur, ut peregrinae condicionis homo ciuem Romanum in potestate habeat. pari ratione et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia aeque ratio non patitur, ut peregrinae condicionis homo in potestate sit ciuis Romani parentis. Inst. 1, 12, 1.

§ 128. As interdiction from fire and water for an offence against the Cornelian law involves loss of citizenship, such removal of a man from the list of Roman citizens operates, like his death, to liberate his children from his power, for it is inconsistent with civil law that an alien should exercise parental power over a citizen of Rome: conversely, the interdiction from fire and water of a person subject to parental power terminates the power of the parent, because it is a similar inconsistency that a person of alien status should be subject to the parental power of a Roman citizen.

§ 129. Quodsi ab hostibus captus fuerit parens, quamuis seru*us* hostium fiat, tamen pendet ius liberorum propter ius postliminii, qu*o* hi qui ab hostibus capti sunt, si reuersi fuerint, omn*ia* pristina iura recipiunt; itaque reuers*us* habebit liberos in potestate. si uero illic mortuus sit, erunt quidem liberi sui iuris; sed utrum ex hoc tempore quo mortuus est apud hostes parens, an ex illo qu*o* ab hostibus captus est, dubitari potest. ipse quoque filius nepos*ue* si ab hostibus captus f*uerit*, similiter dicemus propter *ius* postliminii potestatem *quoque* parentis in suspenso esse. Inst. 1, 12, 5.

§ 129. Though the hostile capture of the parent makes him a slave of the enemy, the status of his children is suspended by the jus postliminii, whereby on escape from captivity a man recovers all former rights: accordingly, if the father returns he will have his children in his power; if he dies in captivity his children will be independent, but whether their independence dates from the death of the parent or from his capture by the enemy may be disputed. Conversely, if a son or grandson is captured by the enemy, the power of his ascendent is also provisionally suspended by the jus postliminii.

§ 130. Praeterea exeunt liberi uirilis sexus de parentis potestate si flamines Diales inaugurentur, et feminini sexus si uirgines Vestales capiantur.

§ 131. Olim quoque, quo tempore populus Romanus in Latinas regiones colonias deducebat, qui *iussu* parentis in coloniam Latinam nomen dedissent, desinebant in potestate *p*arentis esse, quia efficerentur alterius ciuitatis ciues.

§ 130. Further, a son is liberated from parental power by his inauguration as flamen of Jove, a daughter by her selection for the office of Vestal virgin.

§ 131. Formerly, too, when Rome used to send colonies into the Latin territory, a son who by his parents' order enrolled his name in a colony ceased to be under parental power, since he was made a citizen of another state.

§ 128. Relegation was a milder form of punishment than deportation, and involved no loss of civitas nor of domestic rights, Inst. 1, 12, 2.

§ 129. Postliminium is the recovery of rights by a person returned from captivity, or the recovery of rights over a person or thing recovered from hostile possession. The word postliminium seems to be derived from pot, the root of potestas or possessio, and limen or stlimen = ligamen, and therefore would denote the bridging over of the interval of captivity by a fiction of continued capacity or possession, or a doorway is bridged over by a lintel (limen).

§ 130. In imitation of the ancient law Justinian enacted that certain dignities should release from patria potestas; for instance, patriciatus and the episcopate, the latter because it made a man spiritual father of all mankind, Novella, 81.

§ 131. The Latini or members of coloniae Latinae were an intermediate class between cives and peregrini. They differed from peregrini in that they had commercium, i.e. capacity of Quiritary ownership with its incidents, and they differed from cives in not having connubium, and consequently being incapable of patria potestas, Cic. Pro Caecina, 35. Cf. § 22, comm. A Roman citizen could only become a Latin with his own consent. Qui cives Romani in colonias Latinas proficiscebantur, fieri non poterant Latini ni erant auctores facti nomenque dederant, Cic. De Domo, 30. 'Roman citizens who went to Latin colonies did not lose their citizenship without voluntary enrolment among the colonists.' See also Cic. Pro Balbo, 11.

§ 132. *Praeterea* emancipatione desinunt liberi in potestat*e* parent*u*m esse. sed filius

§ 132. Emancipation also liberates children from the power of the parent, a son being liberated

quidem tribus mancipationibus, ceteri uero liberi siue masculini sexus siue feminini una mancipatione exeun*t* de parent*u*m potestate; lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur h*is* uerbis SI PATER FILIVM ⟨*TER*⟩ VENVM D*V*IT, A PATRE FILIVS LIBER ESTO. *eaque* res ita agitur: mancipat pater filium alicui; is eum uindicta manumittit; eo facto reuertitur in potestatem patris; is eum iterum mancipat uel eidem uel alii (sed in usu est eidem mancipari) isque eum postea similiter uindicta manumittit; eo facto rursus in potestatem patris *r*euertitur; tertio pater eum mancipat uel eidem uel alii (sed hoc in usu est, ut eide*m* mancip*etur*), *eaque* mancipatione *de*sinit *i*n pote*st*ate patris ess*e*, e*t*iamsi nondum manumissus sit sed adhuc in causa mancipii. si—|——|——missi—|——
(3 *uersus in C legi nequeunt.*)
Inst. 1, 12, 6; Epit. 1, 6, 3.

by three mancipations, other issue, male or female, by a single mancipation; for the law of the Twelve Tables only mentions three mancipations in the case of the son, which it does in the following terms: IF A FATHER SELL A SON THREE TIMES, THE SON SHALL BE FREE FROM THE FATHER. The ceremony is as follows: the father mancipates his son to some one; the alienee manumits him by fictitious vindication, whereupon he reverts into the power of his father; the father again mancipates him to the same or a different alienee, usually to the same, who again manumits him by fictitious vindication, whereupon he reverts a second time into the power of his father; the father then mancipates him a third time to the same or a different alienee, usually to the same, and by this third mancipation the son ceases to be in the power of the father even before manumission, while still in the status of a person held in mancipation. [The alienee or fiduciary father should then remancipate him to the natural father, in order that thereupon the natural father by manumitting him may acquire the rights of patron instead of the fiduciary father.]

§ 132 *a*. ———|———patrono in bonis lib*erti*|———
(3 *uersus in C legi nequeunt.*)
——|—*feminae una* | mancipatione exeunt de patris pote*state*———|———manumissae fuerint s——|——|———|——
Inst. l. c.

§ 132 *a*. A manumitter of a free person from the state of mancipium has the same rights to the succession of his property as a patron has in respect of the property of his freedman. Women and male grandsons by a son pass out of the power of their father or grandfather after one mancipation; but unless they are remancipated by their fiduciary father, and manumitted by their natural father, the latter has no rights of succession to their property.

§ 133.——*Admonendi autem sumus liberum esse arbitrium et qui filium et ex eo nepotem in potestate habebit, filium quidem de potestate dimittere, nepotem uero in potestate retinere; uel ex diuerso filium quidem in potestate retinere, nepotem uero manumittere, uel omnes sui iuris efficere. eadem et de pronepote dicta esse intellegemus.*——

Inst. 1, 12, 7; Gaius in Dig. 1, 7, 28.

§ 133. But it should be noticed that a grandfather who has both a son, and by his son a grandson, in his power, may either release his son from his power and retain the grandson, or retain the son and manumit the grandson, or emancipate both son and grandson; and a great grandfather has a similar latitude of choice.

§ 134. ——|——et duae intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit, *ut* sui iuris effici*a*tur. deinde aut patri remancipatur, et ab eo is qui adoptat uindicat *a*pud praetorem filium suum esse, et illo contra non uin*di*cante ⟨*a*⟩ praetore uindicanti filius addicitur; aut non remancipa*tur* patri, *sed* ab eo uindicat is qui adop*tat*, *apud* que*m* *in tertia* mancipatione est; sed sane commodius est patri remancipari: in ceteris uero liberorum personis seu masculini seu feminini sexus una scilicet mancipatio sufficit, et aut remancipa*n*tur parenti aut non remancipa*n*tur. Eadem et in prouinciis apud praesidem prouinciae solent fieri.

Inst. 1, 12, 8.

§ 134. A father is also divested of power over his children by giving them in adoption. To give a son in adoption, the first stage is three mancipations and two intervening manumissions, as in emancipation; after this the son is either remancipated to the father, and by the adopter claimed as son from him by vindication before the praetor, and in default of counterclaim by the natural father is awarded by the praetor to the adoptive father as his son; or without remancipation to the natural father is directly claimed by the adoptive father by vindication from the alienee of the third mancipation (fiduciary father); but it is more convenient to interpose a remancipation to the natural father. In the case of other issue, male or female, a single mancipation suffices, with or without remancipation to the natural father. In the provinces a similar ceremony can be performed before the president of the province.

§ 135. Qui ex filio semel iterumue mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in aui potestate est, et ideo ab eo et *e*mancipari et in adoptionem dari potest. At is

§ 135. A grandson begotten after the first or second mancipation of the son, though born after the third mancipation, is subject to the power of the grandfather, and may by him be given in adoption or emancipated: a grand-

qui ex eo filio conceptus est qui in tertia mancipatione est non nascitur in aui potestate. sed eum Labeo quidem existimat *in* eiusdem mancipio esse cuius et pater sit; utimur autem hoc iure, ut quamdiu pater eius in mancipio sit, pendeat ius eius; et siquide*m* pater eius ex mancipatione manumissus erit, ca*dat* in e*iu*s potestatem; si uero is dum in mancipio sit decesserit, sui iuris fiat.

§ 135 *a*. | Eadem scilicet ——|——*nam* | ut supra diximus, quod in filio faciunt tres manci|pationes, hoc facit una mancipatio in nepote.

§ 136. —|——|——|—— Maximi et | Tuberonis cautum est, ut haec quod ad sacra tantum uideatur in manu esse, quod uero ad ceteras causas p*ro*inde habeatur, atque si in manum non conuenisset.|——| —— potestate parentis liberantur; nec in|terest, an in uir*i* sui manu si*nt* an extranei, quamuis hae solae loco filiarum habea*nt*ur quae in uiri ma|nu *sunt*.

son begotten after the third mancipation is not born in the power of the grandfather, but, according to Labeo, is born in mancipation to the person to whom his father is mancipated. The rule, however, which has obtained acceptance with us is, that so long as the father is in mancipation the status of the child is in suspension, and if the father is manumitted the child falls under his power; if the father dies in mancipation the child becomes independent.

§ 135 *a*. The rule is the same in the case of a child begotten of a grandson who has been once mancipated, but not yet manumitted; for, as before mentioned, the result of three mancipations of the son is obtained by a single mancipation of the grandson.

§ 136. A wife subjected to the hand of a husband by confarreation is not thereby freed from the power of her father; and this is declared by the senatusconsult of the consuls of Maximus and Tubero respecting the priestess of Jove, according to which she is only in the marital hand as far as the sacra are concerned, the status of the wife being unaffected in other respects by such subjection. Subjection to hand by coemption liberates from the power of the parent, and it is immaterial whether it is a coemption subjecting the woman to the hand of a husband or to the hand of a stranger, although the status of quasi daughter only belongs to a woman in the hand of a husband.

§ 132. The epitome of Gaius, 1, 6, 3, which throws light on this passage, mentions as present at an emancipation, besides the five witnesses and libripens, a seventh person called antestatus, who is also mentioned in the bronze tablet referred to in the remarks

on pignus and fiducia. Book 3, §§ 90, 91, comm. His duty may have been to ask the witnesses whether they were bearing witness to the transaction (antestari). Cf. Roby, Private Law, pp. 180, n. 2, 423, n. 3.

The vindicta or wand used in manumission, as already stated, was the rod or verge symbolizing a lance carried by the parties in a real action, 4 § 13. The status of freedom (libertas) whether as opposed to slavery or to bondage (mancipii causa) was a real right (jus in rem), and therefore a subject to be contested in a vindicatio. Manumission by vindicta was a collusive vindicatio, in other words, an in jure cessio. Cf. Roby, 1, p. 26, n. 1.

The epitome of Gaius (l. c.) calls the person, to whom the son was mancipated by pater naturalis, pater fiduciarius, which implies that the mancipation was accompanied by a fiducia or declaration of trust. The trust would be that the pater fiduciarius should make default or confess in the subsequent in jure cessio.

§ 134. Assuming that in adoption, as in emancipation, the person to whom the son was mancipated was called pater fiduciarius, we find in adoption three fathers in the field, pater naturalis, pater fiduciarius, and pater adoptivus. Remancipation to the natural father added a stage to the process; but is described as more convenient, because it reduced the number of actors from three to two; for it enabled the part of pater fiduciarius to be played by pater adoptivus. It appears from § 135 (cf. however § 141) that though the status of bondage was purely formal, yet perhaps to give an air of reality to the drama, the status was sometimes made to have a certain duration. So when a prince is advanced from the rank of private to that of general, a certain interval is interposed between the intermediate promotions for the sake of decorum, though, the whole proceeding being unreal, all the steps, if the authorities were so disposed, might be compressed into a single day. Ihering, § 46.

The status of paterfamilias or of filiusfamilias being, like other kinds of status, a real right, the claim of a person as filiusfamilias was a matter to be contested in a real action or vindicatio brought against the person in whose possession he was. This would seem the more obvious in primitive times, when probably no distinction was made between patria potestas and dominica potestas, i.e. between paternal power and absolute proprietorship. Such vindicatio was sometimes a matter of contentious (not voluntary) jurisdiction, i.e. of genuine litigation. Cf. Dig. 6. 1, 1, 2, where we are told that the ground of making a claim of this kind must be particularly specified (adfecta causa) in the vindication. The ordinary mode of judicially determining the status of a child in case of dispute was

by a praejudicium, 4 § 44, comm. The father could compel any one, who had possession of his child, to produce him by the interdictum de liberis exhibendis or de liberis ducendis 4 §§ 138-170, comm. In case of dispute between paterfamilias and filiusfamilias inter se, recourse might be had to the extraordinaria cognitio of the magistrate. Sohm's Inst. § 101.

Justinian simplified the formalities of emancipation and adoption. He allowed the former to be accomplished by a simple declaration of the father before a competent judge or magistrate (Emancipatio Justinianea); and the latter after appearance of all the parties before such a judge, insinuatio, i.e. a memorandum of the transaction in the public records (actis intervenientibus) being in both cases required. Emancipation by imperial rescript had been previously instituted by the Emperor Anastasius (Emancipatio Anastasiana). Imperial rescript was required for effecting an arrogation.

In English law children are enfranchised, and the limited power of the father over their person and property is terminated by two events which did not operate emancipation in Roman law, marriage and arrival at years of discretion, that is, attainment of majority by the completion of twenty-one years of age. At these points, under English law, the empire of the father or other guardian gives place to the empire of reason; whereas neither marriage nor majority released the Roman son or daughter from potestas.

§ 136. Cf. §§ 108-115 *b*, comm. Q. Aelius Tubero and Paulus Fabius Maximus were consuls B.C. 11, the year in which the office of flamen dialis was re-established. This cannot therefore be the law A.D. 23 referred to by Tacitus, Ann. 4, 16 (see note to Muirhead's Gaius).

§ 137.——|——|——| — *mancipatione* desinunt in manu esse, et si ex ea mancipatione manumissae fuerint sui iuris ef|ficiuntur.

§ 137. A woman subjected to hand by coemption is, like a daughter, released therefrom by one mancipation, and on subsequent manumission becomes independent.

§ 137 *a*. ——quae——| ——cogere coem*pti*|onatorem *potest*, ut se *remancipet*, cui ipsa uel|it——nihil*o* magis potest cogere, quam et filia patrem. sed filia quidem nullo modo patrem potest cogere, etiamsi adoptiua sit; haec autem ⟨*uirum*⟩ repudio misso proinde conpellere potest, at-

§ 137 *a*. Between a woman who has entered into a coemption with a stranger and a woman who has entered into a coemption with a husband there is this difference, that the former has the power of compelling the coemptionator to remancipate her to any one she pleases, whereas the latter cannot compel him to do this any more than a daughter can her father.

que si ei numquam nupta fuisset.

§ 138. Ii qui in causa mancipii sunt, quia seruorum loco habentur, uindicta censu testamento manumissi sui iuris fiunt.

§ 139. Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requirimus, cuius aetatis sit is qui manumittit et qui manumittitur; ac ne illud quidem, an patronum creditoremue manumissor habeat. ac ne numerus quidem lege Fufia Caninia finitus in his personis locum habet.

§ 140. Quin etiam inuito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit ut sibi remancipetur; nam quodammodo *tunc* pater potestatem propriam reseruare sibi uidetur eo ipso, quo*d* mancipio recipit. ac ne is quidem dicitur inuito eo cuius in mancipio est censu libertatem consequi, quem pater ex noxali causa [mancipio dedit], ueluti quod furti eius nomine damnatus est, [et eum] mancipio actori dedit; nam hunc actor pro pecunia habet.

A daughter, however, has no means of compelling her father to emancipate her even if she is only such by adoption, whereas a wife by sending a message of divorce can compel her husband to release her from his hand, just as if they had never been married.

§ 138. As persons in mancipation are in the position of slaves, manumission by fictitious vindication, by entry on the censor's register, by testamentary disposition, are the modes by which they acquire independence.

§ 139. But to them the lex Aelia Sentia has no application: no age of the person manumitting or the person manumitted is required; the manumission is subject to no proviso against fraud on the rights of patron or creditors, nor even to the numerical limitation of the lex Fufia Caninia.

§ 140. But even though the assent of the holder in mancipation is withheld, freedom may be acquired by entry on the register of the censor, except when a son has been mancipated by a father with a condition of remancipation, then the father is deemed to have reserved in a way his own power in consequence of the condition that he is to have him back in mancipation; nor can liberty be acquired without the assent of the holder in mancipation by entry on the censor's register when a delinquent son has been surrendered by his father in consequence of a noxal suit; when, for instance, the father has been condemned in an action for a theft committed by the son, and has by mancipation surrendered his son to the plaintiff, for in this case the plaintiff holds him in lieu of pecuniary damages.

§ 141. In summa admonendi sumus aduersus eos quos in mancipio habemus nihil nobis contumeliose facere licere; alioquin iniuriarum tenebimur. ac ne diu quidem in eo iure detinentur homines, sed plerumque hoc fit dicis gratia uno momento, nisi scilicet ex noxali causa mancipentur.

§ 141. Finally, it is to be observed that contumelious treatment of a person held in mancipation is not permitted, but renders liable to an action of outrage; and the status generally is not persistent, but merely formal and momentary, except when it is the consequence of surrender in lieu of damages in an action of trespass.

§ 137. Dissolution of marriage (divortium) could be effected either by the consent of both parties or by the act of one. The message of repudiation (repudium) contained the formula, Tuas res tibi habeto, 'Take away thy property.' Mimam illam suam suas res sibi habere jussit, claves ademit, exegit, Cic. Phil. 2, 28. 'The actress was ordered to pack, deprived of the keys, turned out of the house.' The lex Julia de adulteriis prescribed a form for repudium, and required the message to be delivered by a freedman of the family, in the presence of seven witnesses above the age of puberty and citizens of Rome. The party who made a causeless repudium, or whose misconduct justified a repudium, was punished by pecuniary losses in respect of dos and propternuptial donations. After much veering legislation under the Christian Emperors, Justinian enacted that a man or woman who divorced without a cause should retire to a cloister and forfeit all his or her estate, one moiety to his or her successors, and the other moiety to the cloister. Nov. 134, 11. But it was not till later times that the Church succeeded in making marriage indissoluble by law.

§ 140. Ihering, § 32, infers from this that the census, like a year of jubilee, freed all but noxal and fictitious bondsmen at the end of five years: and that the Twelve Tables, in limiting a father to three mancipations, disabled him from selling the services of his son for more than fifteen years. As to noxal surrender of filiifamilias see 4 §§ 75–81.

§ 141. Whereas no injuria could be done to a slave. 4 § 222.

DE TVTELIS.

§ 142. Transeamus nunc ad aliam diuisionem. nam ex his personis quae neque in potestate neque in manu neque in mancipio sunt quaedam uel in tutela sunt uel in curatione, quaedam neutro iure tenentur.

§ 142. Let us now proceed to another classification: persons not subject to power, nor to hand, nor held in mancipation, may still be subject either to tutelary guardianship or to curatorship, or may be exempt from both forms of control. We will first

uideamus igitur quae in tutela quae in curatione sint; ita enim intellegemus *c*eter*as* personas quae neutro iure tenentur.

Inst. 1, 13 pr.

§ 143. Ac prius dispiciamus de his quae in tutela sunt.

Inst. l. c.

§ 144. Permissum est itaque parentibus liberis quos in potestate sua habent testamen*to* *tu*tores dare: masculini quidem sexus inpuberibus, ⟨*feminini autem sexus cuiuscumque aetatis sint, et tum quo*⟩que, cum nuptae sint. ueteres enim uoluerunt feminas, etiamsi perfectae aetatis sint, propter animi leuitatem in tutela esse.

Inst. 1, 13, 3.

§ 145. Itaque si quis filio filiaequ*e* testamento tutorem dederit et ambo ad pubertate*m* peruenerint, filius quidem desinit haber*e* tutorem, filia uero nihilo minus in tutela permanet; tantum enim ex lege Iulia et Papia Pop*pae*a iure liberorum tutela liberantur feminae. loquimur autem exceptis uirginibus Vestalibus quas etiam ueteres in honore*m* sacerdotii liberas esse uoluerunt, itaque etiam leg*e* XII tabularum cautum est.

Inst. l. c.

§ 146. Nepotibus autem neptibusque ita demum possumus test*amento* tutores dare, si post mortem nostram in patris sui potestatem [iure] recasuri non sint. itaque si filius meus mortis meae tempore in potestate mea sit, nepotes *e*x eo non pote*ru*nt ex testamento meo habere tutorem, quamuis in potestate mea fuerint; scilicet quia mortuo me in patris sui potestate futuri s*u*nt. Inst. l. c.

examine what persons are subject to tutelary guardianship and curatorship, and thus we shall know who are exempt from both kinds of control.

§ 143. And first of persons subject to tutelary guardianship or tutelage.

§ 144. The law allows a parent to appoint guardians in his will for the children in his power, below the age of puberty, if they are males; whatever their age, and notwithstanding their marriage, if they are females; for, according to our ancestors, even women who have attained their majority, on account of their levity of disposition, require to be kept in tutelage.

§ 145. Accordingly, when a brother and sister have a testamentary guardian, on attaining the age of puberty the brother ceases to be a ward, but the sister continues, for it is only under the lex Julia and Papia Poppaea by title of maternity that women are emancipated from tutelage; except in the case of vestal virgins, for these, even in our ancestors' opinion, are entitled on account of the dignity of their sacerdotal function to be free from control, and so the law of the Twelve Tables enacted.

§ 146. A grandson or granddaughter can only receive a testamentary guardian provided the death of the testator does not bring them under parental power. Accordingly, if at the time of the grandfather's death the father was in the grandfather's power, the grandchildren, though in the grandfather's power, cannot have a testamentary guardian, because his death leaves them in the power of the father.

§ 147. Cum tamen in conpluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis quam iam natis testamento tutores dari posse, si modo in ea causa sint, ut si uiuis nobis nascantur, in potestate nostra fiant. hos ⟨*enim*⟩ etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non *si*t. Inst. 1, 13, 4.

§ 147. As in many other matters after-born children are treated on the footing of children born before the execution of the will, so it is ruled that after-born children, as well as children born before the will was made, may have guardians therein appointed, provided that if born in the testator's lifetime they would be subject to his power [and self-successors], for such after-born children may be instituted heirs, but not after-born strangers.

§ 148. ⟨*Vxori*⟩ quae in manu est proinde *ac* filiae, item nurui quae in fili*i* manu est proinde ac n*e*pti tutor dari potest.

§ 148. A wife in the testator's hand may receive a testamentary guardian as if she were a daughter, and a son's wife in the son's hand as if she were a granddaughter.

§ 149. Rectissime autem tutor sic dari potest: L. TITIVM LIBERIS MEIS TVTOREM D*O*. sed et si ita scriptu*m* sit LIBERIS ME*IS* uel VXORI MEAE TITIVS TVTOR ESTO, recte datus intellegitur.

§ 149. The most regular form of appointing a guardian is in the following terms: 'I APPOINT LUCIUS TITIUS GUARDIAN TO MY CHILDREN'; the form, 'BE LUCIUS TITIUS GUARDIAN TO MY CHILDREN'—or, 'TO MY WIFE'—is also valid.

§ 150. In persona tamen uxoris quae in manu est rece*p*ta est etiam tutoris optio, id est ut liceat ei permittere quem uelit ipsa tutorem sibi optare, hoc modo: TITIAE VXORI MEAE TVTORIS OPTIONEM DO. quo casu licet uxori ⟨*tutorem optare*⟩ uel in omnes res uel in unam forte aut duas.

§ 150. To a wife in his hand a testator is permitted to devise the selection of her guardian, that is, he may authorize her to choose whom she pleases, in the following terms: 'To TITIA MY WIFE I DEVISE THE SELECTION OF HER GUARDIAN'; whereupon she may nominate either a general guardian or a guardian for certain specified matters.

§ 151. Ceterum aut plena optio datur aut angusta.

§ 151. The option of a guardian may be limited or unlimited.

§ 152. Plena ita dari solet, ut proxim*e* supra diximus. angusta ita dari solet—TITIAE VXORI MEAE *TVTORIS OPTIONEM DVMTAXAT* SEMEL DO, aut DVMTAXAT BIS DO.

§ 152. Unlimited option is usually devised in the form above mentioned; limited option in the following terms: 'To TITIA MY WIFE I DEVISE NOT MORE THAN ONE OPTION'—or, 'NOT MORE THAN TWO OPTIONS—OF A GUARDIAN.'

§ 153. Quae optiones plurimum inter se differ*u*nt. nam quae plenam optionem habet potest semel et bis et ter et

§ 153. The effect of these forms is very different: unlimited option is a power of choosing a guardian an indefinite number of times;

saepius tutorem optare; quae uero angus*tam* habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non pote*st*; si *dumtaxat* bis, amplius quam bis optandi facultatem non habe*t*.

limited option is the right of a single choice, or of two choices, as may happen.

§ 154. Vocantur autem hi qui nominatim testament*o* tutores dantur datiui, qui ex optione sumuntur optiui.

§ 154. A guardian actually nominated by the will of the testator is called a dative guardian; one taken by selection (of the widow) is called an optative guardian.

Having examined those inferiorities of legal capacity which constituted a status, we now proceed to examine certain cases of incapacity of acting independently which, though analogous to the former as belonging to the sphere of unequal rights, were not included by the Romans under the denomination of status. The inferiorities of capacity in infancy, minority, tutelary wardship, curatel, were different in character and not so considerable as those which we have hitherto examined. The diminution of rights in a lapse from independence to curatel was less than the least capitis minutio, and accordingly a prodigal who was interdicted from the administration of his estate and subjected to the control of a curator, was not said to undergo a status mutatio: his patrimony still vested in him, though he was deprived of its administration; whereas adrogatio and in manum conventio divested a person of the capacity of ownership and active obligation: inferior status, in a word, is incapacity of right; wardship and curatel are only incapacities of disposition.

Guardianship is thus defined: Est autem tutela, ut Servius definit, jus ac potestas in capite libero, ad tuendum eum qui propter aetatem se defendere nequit, jure civili data ac permissa, Inst. 1, 13, 1. 'Guardianship is a right and power over an independent person conferred or authorized by the Civil law for the protection of one who is incapacitated by age for self-defence.' The duties of the guardian related both to the person and to the property of the ward. In respect of his person, the guardian was charged with the care of his nurture and education: in respect of his property, the guardian's function was distinguished as either exclusive administration or concurrent interposition of authority (rem gerere et auctoritatem interponere). Up to the age of seven the ward was called infans, 3 § 109, and during this period the guardian acted alone (administratio, negotiorum gestio); after the completion of seven years until the age of puberty (fourteen for males, as the time was ultimately fixed,

twelve for females) the ward acted, and the guardian concurrently gave his sanction (auctoritas). The sanction of the guardian was a legal act of a highly formal character (actus legitimus), by which such legal acts of his ward, as would otherwise have been imperfect, obtained validity. Accordingly the guardian could not give his sanction by letter or through an agent, but had to be present himself for the purpose at the time when the act of the ward was executed, so that he might be a subsidiary party to it. Inst. 1, 21, 2 Tutor autem statim in ipso negotio praesens debet auctor fieri, si hoc pupillo prodesse existimaverit. post tempus vero aut per epistulam interposita auctoritas nihil agit.

The sanction of the guardian was necessary whenever the act of the ward was one which might possibly entail loss, but not otherwise. Cf. 2 §§ 80–85, Inst. l. c. pr. and 1 Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria. ut ecce si quid dari sibi stipulentur, non est necessaria tutoris auctoritas: quod si aliis pupilli promittant, necessaria est: namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem autem non aliter quam tutore auctore. unde in his causis, ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, . . . si tutoris auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur, at invicem pupilli non obligantur In respect of administration of property the guardian incurred a quasi-contractual obligation, and was accordingly liable to the judicium or actio tutelae.

In the time of Gaius, women continued subject to guardianship after the age of puberty: the functions of the guardian were in their case confined to auctoritas, which in most cases was a mere formality; the power of administration vested in the woman, § 190.

§ 147. For an account of the different classes of Postumi see 2 § 130, comm.

§ 148. In filii manu must be regarded as an inaccurate expression: for filiusfamilias was incapable of all civil rights, including manus, and could only serve as a conduit-pipe by which the right of manus vested in his father.

§ 154. In the Code and Digest of Justinian the term tutor dativus is used to signify a guardian appointed by a magistrate. Cod. 5, 50, 5; Dig. 46, 6, 7.

DE LEGITIMA AGNATORVM TVTELA.

§ 155. Quibus testamento quidem tutor datus non sit, iis ex lege XII ⟨*tabularum*⟩ agnati sunt tutores, qui uocantur legitimi. Inst. 1, 15 pr.

§ 155. In default of a testamentary guardian the statute of the Twelve Tables assigns the guardianship to the nearest agnates, who are hence called statutory guardians.

§ 156. Sunt autem agnati per uirilis sexus personas cognatione iuncti, quasi a patre cognati, ueluti frater eodem patre natus, fratris filius neposue ex eo, item patruus et patrui filius et nepos ex eo. at hi qui per feminini sexus personas cognatione coniunguntur non sunt agnati, sed alias naturali iure cognati. itaque inter auunculum et sororis filium non agnatio est, sed cognatio. item amitae, materterae filius non est mihi agnatus, sed cognatus, et inuicem scilice*t* e*g*o illi eodem iure coniungor, quia qui nascuntur patris, non matris familiam secuntur. Inst. 1, 15, 1.

§ 156. Agnates (3 § 10) are persons related through males, that is, through their male ascendents: as a brother by the same father, such brother's son or son's son; a father's brother, his son or son's son. Persons related through female ascendents are not agnates but simply cognates. Thus, between an uncle and his sister's son there is not agnation, but cognation: so the son of my aunt, whether she is my father's sister, or my mother's sister, is not my agnate, but my cognate, and vice versa; for children are members of their father's family, not of their mother's.

§ 157. *Et* olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. sed postea lex Claudia lata est quae, qu*od* ad feminas attinet, ⟨*agnatorum*⟩ tutelas sustulit; itaque masculus quidem inpubes fratrem puberem aut patruum habet tutorem, femina uero talem habere tutorem non potest.

§ 157. In former times, the statute of the Twelve Tables made females as well as males wards of their agnates: subsequently a law of the Emperor Claudius abolished this wardship in the case of females: accordingly, a male below the age of puberty has his brother above the age of puberty or his paternal uncle for guardian, but a female cannot have such a guardian.

§ 158. Sed agnationis quidem ius capitis deminutione perimitur, cognationis uero ius eo modo non commutatur, quia ciuilis rati*o* ciuilia qu*i*d*em* iura corrumpere potest, naturalia uero non potest. Inst. 1, 15, 3.

§ 158. *Capitis deminutio* extinguishes rights by agnation, while it leaves unaffected rights by cognation, because civil changes can take away rights belonging to civil law (jus civile), but not rights belonging to natural law (jus naturale).

§ 156. As to this definition of agnati see Moyle's note to Inst. 1, 15, 1. The maxim here enunciated is calculated to give a false idea of the relation of the institutes of jus gentium to those of jus civile. Title by cognation is just as much an institute of positive law as title by agnation, though cognation, or blood-relationship, is in itself a natural and permanent tie, while agnation is an artificial one, and therefore only occasional. The synthesis of title and right in jus

civile may be freakish and capricious, while that in jus gentium may be reasonable and expedient; but both are equally positive institutions, and both are equally mutable and liable to be overruled. Accordingly, the specious-sounding maxim, that revolutions in status or civil condition cannot affect such rights as are annexed to natural titles, crumbles away as soon as we examine it, for we find that it only holds good of the most insignificant change, the minima capitis minutio, 3 § 27, and that maxima and media capitis minutio extinguish title by cognation, which belongs to jus gentium, as well as title by agnation, which belongs to jus civile. Inst. 1, 16, 6.

The truth is, that the effects of a collision of Civil and Natural law fall under two very different classes, which it is important to distinguish.

1. If the command of the civil lawgiver, under the sway of motives financial, political, ethical, or religious, is highly imperious and absolutely compulsive, all natural titles with which it may come in conflict are absolutely void and inoperative: e. g. the Sc. Velleianum, prohibiting suretyship of women, allowed no naturalis obligatio to be produced by any such suretyship: and so with the laws prohibiting gambling and usury.

2. If the command of the civil law is less peremptory and absolute, it may deprive any conflicting natural title of plenary force, and yet leave to it a naturalis obligatio capable of acquiring efficacy by some machinery of positive law; e. g. the Sc. Macedonianum, prohibiting money loans to a filiusfamilias without the sanction of his father, made them irrecoverable by action, and yet the courts recognized in the borrowing filiusfamilias a naturalis obligatio, which was capable of novation, Dig. 46, 2, 19, and a bar to recovery back (condictio indebiti) in case of actual repayment, Dig. 14, 6, 10.

When Justinian consolidated the law of intestate succession and made the right of succession depend on cognation instead of agnation, he made a corresponding change in the obligation of guardianship, which henceforth devolved on cognates instead of agnates, women as formerly, with the exception of mothers and grandmothers, being excluded from the office, Nov. 118, 5.

DE CAPITIS MINVTIONE.

§ 159. Est autem capitis deminutio prioris *status* permutatio. eaque tribus modis accidit: nam aut maxima est capitis *deminutio*, aut minor quam quidam mediam uocant, *aut minima*. Inst. 1, 16 pr.

§ 159. *Capitis deminutio* is a change of a former status which occurs in three ways, i. e. it is either greatest, minor or mediate, or least.

§ 160. Maxima est capitis deminutio, cum aliquis simul et ciuitatem et libertatem amittit; quae accidit incensis, qui ex forma censuali uenire iubentur; quod ius p———| ——— ex lege —|——— qui contra eam legem in urbe Roma do|micilium habuerint; item feminae quae ex senatuseonsulto Claudiano ancillae fiunt eorum dominorum. quibus inuitis et denuntiantibus cum seruis eorum coierint. Inst. 1, 16, 1.

§ 160. The greatest *capitis deminutio* is the simultaneous loss of citizenship and freedom, which happens to those who having evaded inscription on the censorial register are sold into slavery according to the regulations of the census, also under the —— law when persons in violation of it make Rome their place of residence, and also under the Sc. Claudianum in case of persistent intercourse on the part of a free woman with another person's slave in spite of the dissent and denunciation of the owner.

§ 161. Minor siue media est capitis demi*nutio*, cum ciuitas amittitur, libertas retinetur; quod accidit ei cui aqua et igni interdictum fuerit. Inst. 1, 16, 2.

§ 161. Minor or intermediate loss of status is loss of citizenship unaccompanied by loss of liberty, and is incident to interdiction of fire and water.

§ 162. Minima est capitis deminutio, cum et ciuitas et libertas retinetur, sed status hominis commutatur; quod accidit in his qui adoptantur, item in his quae coemptionem faciunt, et in his qu*i* mancipio dantur quique ex mancipatione manumittuntur; adeo quidem, ut quotiens quisque mancipetur aut manumittatur, totiens capite deminu*a*tur. Inst. 1, 16, 3.

§ 162. There is the least *capitis deminutio* retaining citizenship and freedom when a man's position in the family only is changed, which occurs in adoption, coemption, and in the case of those given in mancipium to be afterwards manumitted, so that after each successive mancipation and manumission a *capitis deminutio* takes place.

§ 163. Nec solum maior*ibus* ⟨*capitis*⟩ deminutionibus ius agn*a*tionis corrumpitur, sed etiam minima; et ideo si ex duobus liberis alterum pater emancipauerit, post obitu*m* eius neuter alteri agnationis iure tutor esse poterit.

§ 163. Not only by the two greater losses of status are rights of agnation extinguished, but also by the least: accordingly, if one of two children is emancipated, the elder cannot on the father's decease be guardian to the younger by right of agnation.

§ 164. Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum qui proximo gradu sunt.

§ 164. When agnates are entitled to be guardians, it is not all who are so entitled, but only those of the nearest degree.

§ 160. Ulpian also refers to the penalty incurred by incensi (11, 11 cum incensus aliquis venierit; cf. Cic. Pro Caec. 34, 99). The lex, the name of which is now illegible, may possibly be the lex Aelia Sentia, which by one of its provisions recalled into slavery dediticii, who resided in Rome or within a certain distance from it (§ 27), though there is the difficulty that it would be inaccurate to speak of such freedmen suffering loss of citizenship as well as liberty. Other grounds of reducing to slavery existed at various times, as surrender by the pater patratus to a foreign state for an offence against international law, Livy, 5, 36, or evasion of military service (populus quum eum vendidit qui miles factus non est, Cic. Pro Caec. 34, 11; Ulp. 11, 11), or capture by the enemy, § 129, or condemnation for a capital crime, which made the convict a slave of punishment (servus poenae, Inst. 1, 16, 1), i.e. reduced him to penal servitude, or condemnation of a freedman for ingratitude towards his patron (libertus ingratus circa patronum condemnatus, ibid.) whereupon he forfeited his freedom, or collusion of a freeman in consenting to be sold as a slave on condition of sharing the purchase-money (cum liber homo, major viginti annis, ad pretium participandum sese venundari passus est, Inst. 1, 3, 4). After the price had been paid, the vendor disappeared, the supposed slave recovered his liberty by a liberalis causa, and the purchaser was left without his slave and without his money. The praetor, to check this fraud, allowed the purchaser to defend himself by exceptio doli, and senatusconsulta subsequently enacted, that if the person sold was twenty years old at the time of the sale or partition of the price, he should really become the slave of the purchaser, Dig. 40, 12, 7 pr. 1.

The libertus ingratus would exemplify a fall from the condition of libertinus to that of servus; any of the other instances might be a case of a fall from ingenuus to servus; the fall from ingenuus to libertinus would also be an analogous kind of degradation. Thus by the Sc. Claudianum a freewoman (ingenua) who had commerce with a slave with the consent of his proprietor procreated slaves without forfeiting her own freedom, § 84; she lost status, however, for she became the freedwoman of the proprietor, Paulus, 4, 10, 2; Tac. Ann. 12, 53.

§ 161. Under the category of Civitas, as there are three classes, civis, latinus, peregrinus, so there are three possible degradations, the fall from civis to Latinus, instanced in the emigrant to a Latin colony, § 131; the fall from civis to peregrinus, instanced in the interdiction or deportation of a civis; and the fall from Latinus to peregrinus, instanced when the same events happened to Latinus. A lapse from liber to servus was a dissolution of marriage, for

servus was incapable of matrimony: a lapse from civis to Latinus or peregrinus was a dissolution of civil wedlock (connubium), for this could only subsist between cives; but if both parties consented, they might continue in gentile wedlock (matrimonium), Cod. 5, 17, 1. The confiscation of property or universal succession of the fiscus, which accompanied greatest and minor loss of status, was not an incident of the latter kind of capitis minutio (e.g. it did not happen when civis became Latinus by emigration; and an alien, as a citizen became by deportation, was capable of holding property), but was a special provision of the criminal code. (For an account of the different Roman forms of banishment see Mommsen, Röm. Strafr. 5, pt. 7.)

The political elements of civitas, suffragium and honores, were forfeited by infamy (infamia) or loss of civic honour (existimatio); and hence arises the question whether infamia is to be regarded as a capitis minutio (see, on this subject, Greenidge, Infamia).

Austin, in laying the bases of jurisprudence, has referred to the law of honour to illustrate the difference of positive law from all law not positive; but in Rome the law of honour, as the law of religion in most modern states, was partially taken up into positive legislation. The public sentiments of esteem and disesteem, that is to say, were armed with political sanctions, and thus certain proceedings were discouraged which were not otherwise prohibited by positive law, and the due application of these sanctions was the function of a special organ appointed by the legislator. This organ was the censor, who had both a discretionary power of branding a man with ignominy by an annotation against his name in the civic register (notatio, subscriptio censoria), and, as revisor of the lists of the senate, the knights, and the tribes, enforced the disabilities of infamy by removing the infamous person from any of those bodies. As the Comitia Centuriata, as well as the Comitia Tributa, had in later times been connected with the division into tribes, the tribeless man (aerarius) forfeited his vote and became incapable of military service, Livy, 7, 2. These graver consequences of infamy were not in the discretion of the censor, but governed by strict rules of consuetudinary law (jus moribus introductum). The law of infamia, as established by the censor, came to be also recognized by the praetor in his edict (cf. Dig. 3, 1, 1, 8 Qui edicto praetoris ut infames notantur), who made infamy not only a consequence of condemnation in any criminal trial (publicum judicium), but also of condemnation in certain civil actions founded on delict, such as theft, rapine, outrage, fraud; or on certain contracts, such

as partnership, agency (mandatum), deposit; or on quasi contract, such as guardianship; or of insolvency (bona possessa, proscripta, vendita); or, without any judicial condemnation, was annexed to certain violations of the marriage laws, such as bigamy or the marriage of a widow before the termination of her year of mourning, and to the pursuit of certain professions, such as that of stage-player or gladiator. In some of these latter instances consuetudinary law, as above intimated, inflicted positive sanctions on acts that originally had only been prohibited by the law of honour. In view of these consequences, infamia may at one time have been regarded as capitis minutio. Cicero pro Quinctio speaks of a suit involving existimatio as a causa capitis (cf. pro Rosc. Com. 6), and Tertullian, the father of the Church, who was noted for his knowledge of Roman law, and possibly was identical with the jurist of that name, of whom five fragments are preserved in the Digest, speaks of infamia as capitis minutio, De Spectaculis, 22, Scenicos manifeste damnant ignominia et capitis deminutio. But the political rights of civitas had ceased to be of importance under the emperors, and we are expressly told in the Digest that only death or loss of citizenship can be understood to affect a man's caput, Modestinus in Dig. 50, 16, 103.

Besides extinguishing the political or public elements of civitas, infamia affected to a certain extent its private elements, both commercium and connubium; the former, as we shall see, in respect of the office of cognitor, 4 § 124 (cf. Dig. 3, 1, de postulando), and the latter in respect of the disabilities of celibacy under the lex Julia, which were not removed by marriage with an infamis. Both these classes of disability had practically vanished even before they were abolished in the time of Justinian.

This seems the proper place to notice certain inequalities of condition, analogous to the old distinctions of status, which grew up subsequently to the time of Gaius in the later ages of Rome, and some of which survived the fall of the Roman empire. From the establishment of the empire the army was caressed by each succeeding despot, and privileges of various kinds were so accumulated on the military service, that the relation of the soldiery to the rest of the world very much resembled the ancient relation of Romanus to peregrinus. The pre-eminence of the military caste was the result of elevation; other unprivileged castes were created by depression. As the new religion grew to political power, zealous legislators were eager to promote its ascendency by the means of political sanctions. Pagans, Jews, heretics, apostates, protestants, papists, were successively frowned upon by the legislator, and for a long season subjected to incapacities and disabilities as great as, or greater than,

those which weighed upon infames: until by a change in political conceptions these inequalities of right have been again levelled and almost obliterated in most of the codes of modern Europe. See also the remarks on Colonatus, 3 § 145.

§ 162. In the category of domestic position there are three classes, (1) sui juris, or paterfamilias and materfamilias; (2) filiusfamilias and filiafamilias; and (3) mancipium: but there are only two possible degradations, (1) from sui juris to alieni juris, which occurs in adrogation and the in manum conventio of a woman previously independent; and (2) from filius- or filiafamilias to mancipium, which occurs in noxal surrender, in emancipation, in adoption as implying mancipation, and in the remancipation of a woman by her husband or the person who held her in manu in virtue of a fiduciary coemption. The descent from sui juris to mancipium cannot occur, because the only persons capable of passing into the condition of mancipium by the process of mancipation were filius- and filiafamilias and women in manu, i. e. persons already alieni juris.

In the exposition of capitis minutio, and particularly of the third and last kind, I have adopted the theory of Savigny as being the most tenable, and forming the most harmonious system of legal conceptions. I must now briefly notice an opposing theory, and the objections that may be raised against that of Savigny. Some expositors hold that capitis minutio minima did not necessarily and essentially involve any degradation, any downward step on the ladder of status, but might be merely a horizontal movement on the same platform, a transit from family to family, a disruption of the ties of agnation, a cessation of membership in a given civil group. (See on this subject Dr. Moyle's Excursus, Inst. Bk. 1, and Professor Goudy's App. to Muirhead's Roman Law, second ed., p. 426, where Mommsen's explanation is given.) This opinion is founded on the authority of Paulus, undeniably an eminent juris auctor, who defines the least diminution of head as follows: Dig. 4, 5, 11. 'Capital diminution is of three orders, greatest, minor, least; as there are three things that we have, liberty, citizenship, family. The universal loss of freedom, citizenship, family, is the greatest capital diminution; loss of citizenship while liberty is retained is minor capital diminution; when liberty and citizenship are retained, and family only is changed, there is the least capital diminution.' Consistently with this definition Paulus affirms that the children of adrogatus suffer capitis minutio minima: Dig. 4, 5, 3 pr. 'The children who follow an adrogated parent suffer capital diminution, as they are dependent and have changed family': here, then, if Paulus is right, we have capitis minutio without any degradation,

any loss of rank; for the children of adrogatus have the same status of filiifamilias after their father's adrogation as they had before, although in a different family. The proposition, however, that the children of adrogatus suffer capitis minutio is not confirmed by any other jurist, and Savigny supposes that the doctrine was peculiar to Paulus, and was in fact inaccurate. Another objection to the theory of Savigny, though not so serious as the opposing authority of Paulus, is presented by the operation of in manum conventio.

When an independent woman made a coemption she undoubtedly declined in status, as before coemption she was sui juris, and after coemption she is filiafamilias. But a filiafamilias who made a coemption apparently suffered no degradation: the definitive result of the coemption leaves her, as before, filiafamilias, and that, apparently, without having passed through any lower stage; for Gaius expressly says that the lex mancipii, or formula of mancipation in coemption, was not calculated to reduce the woman to a servile condition, § 123. Gaius tells us, however, that coemption operates a capitis minutio, § 162, without limiting the effect to the case of a woman sui juris. The operation of coemption to produce capitis minutio is also mentioned by Ulpian, and again without any express limitation to the case of an independent woman: 11, 13. 'There is least capital diminution when both citizenship and freedom are unimpaired, and only position in household life is changed, as occurs in adoption and subjection to hand.' If filiafamilias underwent capitis minutio when she made a coemption, her case disproves our theory that all capitis minutio requires degradation: but Savigny assumes that, though in these passages there is no express limitation to the case of independent women, yet this limitation must be understood; and there is nothing outrageous in this supposition.

While, however, these objections to the hypothesis of Savigny are doubtless serious, on the other hand they are compensated by legal facts which seem absolutely irreconcilable with the adverse hypothesis, the cases of Flamen Dialis and Virgo Vestalis. Gellius, 1, 12. 'As soon as a vestal virgin is selected and conducted to the shrine of Vesta and delivered to the pontifices, she instantaneously, without emancipation and without capital diminution, is freed from parental power and acquires testamentary capacity. .... Moreover, in the commentary of Labeo on the Twelve Tables it is stated that a vestal virgin is neither heiress-at-law to any one who dies intestate nor, if she herself die intestate, leaves any heir-at-law, and that in this event her property lapses to the state.' For Flamen Dialis, see 3 § 114. If mere transit from a family

and ceasing to belong to a given group of agnates constituted capitis minutio, and was its definition, then the vestal virgin must inevitably have suffered capitis minutio; the fact that she did not, in spite of leaving her family and snapping the agnatic tie, is at once conceivable, on the supposition that there is no capitis minutio without degradation.

Unless capitis minutio minima involved a downward step on the stair of status, it has no analogy to the other forms of capitis minutio, and it is not obvious why it should have the same generic appellation, or why it should be handled in the same department of the code. The rupture of the ties of agnation, extinguishing rights of intestate succession, might be a loss, but it was not a loss from inferiority of privilege; it was a loss of an equal among equals; it was more like the loss of dos which a husband might incur by divorce of his wife, or an heir by neglecting to accept a succession within the appointed period (cretio), 2 § 164; neither of which persons were said to undergo capitis minutio, because neither of them suffered a reduction of the universitas juris called status.

On the whole, then, Savigny seems justified in considering the definition given by Paulus and his statement respecting the children of adrogatus as inexact. Paulus himself, in speaking of emancipation, implies the true conditions of capitis minutio: Dig. 4, 5, 3 Emancipato filio et ceteris personis capitis minutio manifesto accidit, cum emancipari nemo possit nisi in imaginariam servilem causam deductus; aliter atque cum servus manumittitur, quia servile caput nullum jus habet ideoque nec minui potest.

Although rupture of the ties, and forfeiture of the rights, or release from the duties, of agnation, were not the essence of capitis minutio minima, yet they were among its principal consequences. The capite minutus lost his claim as suus heres at civil law, that is, his right to succeed to an intestate ascendent, or to be instituted heir in his will or formally disinherited. These effects of capitis minutio were, however, counteracted to some extent by jus praetorium or the legislation of the praetor (bonorum possessio unde liberi: and contra tabulas). He also lost his right as legitimus heres at civil law, that is, his right to succeed as nearest agnate to an intestate collateral; and here the praetor only so far interposed to assist the capite minutus, as, in default of all persons entitled as nearest agnates, to call him to the succession in the inferior order of cognates (bonorum possessio unde cognati). The collateral civil heir was called legitimus heres (statutory heir) because his title was founded on the statutes of the Twelve Tables, which, in default of self-successors, called the nearest collateral agnates to the succession. Subsequent statutes created certain quasi agnates or persons entitled

to succeed in the same order as if they were agnates, who hence were also called legitimi heredes; e.g. children entitled to succeed to an intestate mother under the Sc. Orphitianum, and mothers entitled to succeed to intestate children under the Sc. Tertullianum. The effect of capitis minutio in extinguishing title to succeed was confined to legitimus heres created by the Twelve Tables, and did not extend to the legitimus heres created by these subsequent statutes.

Besides the effects of capitis minutio which followed logically from its consisting in a degradation or fall in status, and from its involving elimination from a given family or a certain circle of agnates, it had certain other abnormal or arbitrary consequences—consequences, that is, which may have once been explicable on known maxims of the civil law, but which are now inexplicable, whose rationale had perhaps been lost even in the classical period, and is certainly now past conjecture. Such is the rule, that capitis minutio minima of an independent person extinguished the debts of capite minutus. It is true that the injustice operated by this rule of civil law in the case of adrogatio was counteracted by the interposition of the praetor, but, as at civil law filiusfamilias, though incapable of rights, was capable of obligations, it is not obvious why even at civil law a man's debts should have been cancelled by his degradation from the status of paterfamilias to that of filiusfamilias. 3 § 84, comm.; 4 § 38.

DE LEGITIMA PATRONORVM TVTELA.

§ 164 *a*.
(4 *uersus in C legi nequeunt*)
———|——urbe |
(2 *uersus in C legi nequeunt*)
———|—in urbe Roma——|
——itaque ut seru——est——|
———|——sunt——|
(2 *uersus in C legi nequeunt*)
———|——esse—|—simile——|
———|——.

§ 165. Ex eadem lege XII tabularum liber*tarum* et inpuberum liber*torum* tutela ad patronos liberosque eorum pertinet. quae et ipsa tutela legitima uocatur, no*n quia nominatim* ea lege de hac tutela *cauetur, sed* quia proinde accepta est per interpretationem, a*t*que si uerbis legis *introducta*

§ 165. The same statute of the Twelve Tables assigns the guardianship of freedwomen and of freedmen below the age of puberty to the patron and the patron's children, and this guardianship, like that of agnates, is called statutory guardianship, not that it is anywhere expressly enacted in the Twelve Tables, but because the

esset. eo enim ipso, *quod* here*dita*tes libertorum libertarumque, si in*t*estati decessissent, iusserat lex ad patronos liberosue eorum pertinere, crediderunt ueteres uoluisse legem etiam tutelas ad eos pertinere, quia et agnatos, quos ad hereditatem uocauit, eosdem et tutores esse iusserat.

Inst. 1, 17 pr.

interpretation has procured for it as much reception as it would have obtained from express enactment; for the fact that the statute gave the succession of a freedman or freedwoman, when they die intestate, to the patron and patron's children, was deemed by the lawyers of the republic (veteres) a proof that it intended to give them the guardianship also, because the Tables, when they call agnates to succeed to the inheritance, likewise confer on them the guardianship.

§ 166. Exemplo patronorum rec*e*ptae ⟨*sunt et aliae tutelae, quae et ipsae legitimae uocantur. nam si quis filium nepotemue ex filio et deinceps inpuberes, aut filiam neptemue ex filio et deinceps tam puberes quam inpuberes alteri ea lege mancipio dederit, ut sibi remanciparentur, remancipatosque manumiserit, legitimus eorum tutor erit.*⟩

Inst. 1, 18.

§ 166. The analogy of the patron guardian led in its turn to the establishment of other guardianships also called statutory. Thus when a person mancipates to another, on condition of remancipation to himself, either a son or grandson through a son, who are below the age of puberty, or a daughter or granddaughter through a son of whatever age they may be, he becomes their statutory guardian when he manumits them after remancipation.

§ 166 *a*. [DE FIDVCIARIA *TVTELA*.] Sunt et aliae tutelae, quae fiduciariae uocantur, id est quae ideo nobis conpetunt, quia liberum caput mancipatum nobis uel a parente uel a coemptionatore manumiserimus.

Inst. 1, 19.

§ 166 *a*. CONCERNING FIDUCIARY GUARDIANSHIP.

But there are other kinds of guardianship, called fiduciary, which arise when a free person has been mancipated by his parent or coemptionator to an alienee and manumitted by the latter.

§ 167. Sed Latinarum et Latinorum inpuberum *tute*la non omni modo ad manumissores *e*orum pertinet, sed ad eos quorum ante manumissionem ⟨*ex iure Quiritium fuerunt; unde si ancilla*⟩ ex iure Quiritium tua sit, in bonis mea, a me quidem solo, non etiam a te manumissa, Latina fieri potest, et bona eius ad me pertinent, sed eius *tu*tela tibi conpetit;

§ 167. The guardianship of Latins, male or female, below the age of puberty, does not necessarily belong to their manumitter, but on whoever before manumission was their quiritary owner. Accordingly, a female slave belonging to you as quiritary owner, to me as bonitary owner, if manumitted by me without your joining in the manumission, becomes a Latin, and her property belongs to me, but her guardianship

nam ita lege Iunia cauetur; itaque si ab eo, cuius et in bonis et ex *iure* Qu*iritium* ancilla fuerit, facta sit Latina, ad eundem et bona et tutela pertine*nt*.

to you, by the enactment of the lex Junia. If the slave is made a Latin by one who combines the character of bonitary and quiritary owner, both her effects, and the guardianship of her, belong to one and the same person.

DE CESSICIA TVTELA.

§ 168. Agnatis et patronis et liberorum capitum manumissoribus permissum est feminarum tutelam alii in iure cedere; pupillorum autem tutelam non est permissum cedere, quia non uidetur onerosa, cum tempore pubertatis finiatur.

§ 168. Statutory guardians, whether agnates or patrons, and manumitters of free persons, are permitted to transfer the guardianship of a female ward by surrender before a magistrate; the guardianship of a male ward is not allowed to be transferred, because it is not considered onerous, being terminated by the ward's attaining the age of puberty.

§ 169. Is autem, cui ceditur tutela, cessicius *tu*tor uocatur.

§ 169. The surrenderee of a guardianship is called a cessionary guardian.

§ 170. Quo mortuo aut *c*apite deminuto reuertitur ad eum tutorem tutela qui cessit; ipse quoque qui cessit si mort*uu*s aut *c*apite deminutus sit, *a* cessic*io* tutela discedit et reuertitur ad eum, qui post eum qui cesserat secundum gradum in ea tutela habueri*t*.

§ 170. On his death or loss of status the guardianship reverts to the surrenderor, and on the surrenderor's death or loss of status it is devested from the cessionary and reverts to the person entitled after the surrenderor.

§ 171. Sed quantum ad agnatos pertinet, nihil hoc tempore de cessicia tutela qu*a*eritur, cum agnatorum tutulae in feminis lege Claudia sublatae sint.

§ 171. As far, however, as agnates are concerned, in the present day there is no such thing as cessionary guardianship, for agnatic guardianship over female wards was abolished by the lex Claudia.

§ 172. Sed fiduciarios quoque quidam putauerunt cedendae tutelae ius non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen, qui filiam neptemue aut proneptem alteri ea lege mancipio dedit, ut sibi remanciparetur, remancipatamque manumisit,

§ 172. Fiduciary guardians, according to some, are also disabled from transferring their guardianship, having voluntarily undertaken the burden; but although this is the better opinion, yet a parent who has mancipated a daughter, granddaughter, or great-granddaughter, with a condition

idem dici non debet, cum is et legitimus tutor habeatur, et non minus huic quam patronis honor praestandus *sit*.

of remancipation to himself, and manumitted her after remancipation, should be excepted from the rule, for he is ranked with statutory guardians, and has the same privilege as the patron of a manumitted slave.

§ 164 *a*. As in default of agnates the inheritance by the law of the Twelve Tables devolved on the gens it may be inferred by the reasoning adopted in § 165 that the guardianship passed to it also. So it is probable that at the beginning of the lacuna Gaius made mention of the statutory guardianship of the Gentiles, and that this is the passage on the subject referred to in 3, 17. As to the nature of the gens, see Introduction.

§ 166 *a*. Cf. §§ 115, 175, 195 *a*.

§ 167. It seems anomalous that a Latin, i.e. a non-civis, should have been a subject of wardship: for as tutela is an institute of jus civile (§§ 142, comm., 189), i.e. jus civium, we should have expected that, as in the case of patria potestas, both pater and filius must be cives Romani, § 128, so here both parties, the ward as well as the guardian, must of necessity be cives Romani. The anomaly, however, was expressly enacted by the lex Junia: which further departed from the law of the Twelve Tables by separating the guardianship from the right of succession; for it gave the guardianship to the person who before the manumission had been quiritary owner, but the right of succession to the person who had previously been bonitary owner. Latinus was not only capable of being a ward, but also of being a guardian, Fragmenta Vaticana, 193; that is, though he was incapable of being a testamentary guardian, § 23, he could, it would seem, be made a tutor dativus, that is, appointed by a magistrate, § 185.

§ 168. In later Roman law, when the interest of the ward and not that of the agnates was principally regarded, guardianship became inalienable. Similarly in English jurisprudence guardianship is said not to be capable of assignment or transfer, because it is not a right but a duty.

DE PETENDO ALIO TVTORE.

§ 173. Praeterea senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere; quo petito prior desinit; nec interest quam longe absit is tutor.

§ 173. Moreover, a decree of the senate permits female wards to demand a substitute in the place of an absent guardian, who is thus superseded: and the distance of his residence from her domicil [provided it amounts to absence] is immaterial.

§ 174. Sed excipitur, ne in absentis patroni locum liceat libertae tutorem petere.

§ 174. But an exception is made in favour of an absent patron, who cannot be superseded on the application of a freedwoman.

§ 175. Patroni autem loco habemus etiam parentem, qui ex eo, quod ipse sibi remancipatam filiam neptemue aut proneptem manumisit, legitimam tutelam nactus est. ⟨*sed*⟩ huius quidem liberi fiduciarii tutoris loco numerantur; *patroni autem* liberi eandem tutelam adipiscuntur, quam et pater eorum habuit.

§ 175. Ranked with patrons is the parent who by mancipation, remancipation, and manumission of a daughter, granddaughter, or great-granddaughter, has become her statutory guardian. His sons only rank as fiduciary guardians, unlike a patron's sons, who succeed to the same form of guardianship as vested in their father.

§ 176. Sed aliquando etiam in patroni absentis locum permittitur tutorem petere, ueluti ad hereditatem adeundam.

§ 176. For a special and limited purpose the senate permits even the place of a patron in his absence to be filled by a substitute; for instance, to authorize the acceptance of an inheritance.

§ 177. Idem senatus censuit et in persona pupilli patroni filii.

§ 177. The senatusconsult gives similar permission when a patron's son is himself a ward.

§ 178. Nam et lege Iulia de maritandis ordinibus ei, quae in legitima tutela pupilli sit, permittitur dotis constituendae gratia a praetore urbano tutorem petere.

§ 178. For likewise the lex Julia, regulating the marriages of the various orders, permitted a woman whose statutory guardian was himself a ward to apply to the praetor of the city to appoint a guardian for the purpose of constituting her dower.

§ 179. Sane patroni filius etiamsi inpubes sit, libertae efficietur tutor, *quamquam* in nulla re auctor fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere.

§ 179. For a patron's son even before the age of puberty is a freedwoman's guardian, although unable to authorize any proceeding, being himself disabled from acting without his guardian's authorization.

§ 180. Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere.

§ 180. Also a woman whose statutory guardian is a lunatic or dumb is permitted by the senatusconsult, for the purpose of settling her dower, to apply for a substitutive guardian.

§ 181. Quibus casibus saluam manere tutelam patrono patronique filio manifestum est.

§ 181. In which cases the continued guardianship of the patron or patron's son is undisputed.

§ 182. Praeterea senatus censuit, ut si tutor pupilli pu*pi*llaeue suspectus a tutela remotus sit, siue ex iusta causa fuerit excusatus, in locum eius alius tutor detur, quo facto prior tutor amittit tutelam.

§ 182. The senate further decreed that if the guardian of a male or female ward is suspected of misconduct and removed from office, or if he alleges valid grounds for declining to act and is relieved of his functions, a substitute shall be appointed by the magistrate, and on his appointment the office of the former guardian shall determine.

§ 183. Haec omnia similiter et Romae et in prouinciis obseruantur, scilicet ⟨*ut Romae a praetore*⟩ et in prouinciis a praeside prouinciae tutor p*eti debeat.*

§ 183. These rules are in force both in Rome and in the provinces, but in Rome application for the appointment of a tutor must be made to the praetor; in the provinces, to the governor of the province.

§ 184. Olim cum legis actiones in usu erant, etiam ex illa causa tutor dabatur, si inter tutore*m* et mulierem pupillum*ue* leg*e* agendum erat; nam quia ipse tut*or* in re sua auctor esse non poterat, alius dabatur, quo auctore legi*s* actio peragere*tur*; qui dicebatur praetorius tut*or*, quia *a* praetore urbano da*ba*tur. sed post sublatas legis actiones quidam putant hanc speciem dandi tutoris in usu esse desiisse, ali*is autem* placet adhuc in usu esse, si legitimo iudicio agatur.

Ulp. 11, 24; Inst. 1, 21, 3.

§ 184. During the era of litigation by statute-process [4 § 10], another cause of appointing a substitute was the imminence of statute-process between the guardian and the woman or ward; for as the guardian could not give his authority in respect of his own suit, another guardian was appointed to authorize the proceedings in the action, who was called a praetorian guardian, because he was appointed by the praetor of the city. But some hold that since the abolition of statute-process this mode of appointing a guardian ceased to be used, others maintain that it is still the practice on the occasion of a statutory suit (4 § 103).

§ 173. Cf. Ulp. 11, 22. The name and date of this senatusconsultum cannot be ascertained.

§ 178. Gaius, as already stated, wrote a special treatise or commentary on this important law relating to marriage.

§ 179. The law was changed by Justinian, who enacted that no one could become guardian who had not attained his majority, i.e. completed twenty-five years of age, Inst. 1, 25, 13; Cod. 5, 30, 5. The fact of not having attained this age had previously been ground of excuse.

§ 182. Cf. Inst. Just. 1, 26. The actio suspecti tutoris for the removal of the guardian from his office could be maintained by any

person in the interest of the ward. If removed on account of fraud the guardian was infamis, but not so if it was simply for negligence.

§ 183. The ambiguity of the Latin language leaves it doubtful whether in the foregoing paragraphs, §§ 173, 176, 180, 182, Gaius refers to one or several senatusconsults. From Dig. 26, 1, 17, however, it appears that, complura senatusconsulta facta sunt ut in locum furiosi et muti et surdi tutoris alii tutores dentur: i.e. the subject often occupied the attention of the senate. The reason was that the lex Atilia, presently mentioned, had received, after the wont of the ancient jurists, a strictly literal interpretation, and was not deemed to authorize the substitution of a guardian when the existing guardian was incapacitated.

DE ATILIANO TVTORE, ET EO QVI EX LEGE IVLIA ET TITIA DATVR.

§ 185. Si cui nullus omnino tutor sit, ei datur in urbe Roma ex leg*e* Atilia a praetore u*r*bano et maiore parte tribunorum plebis, qui Atilianus tutor uocatur; in prouinciis uero a praesidibus prouinc*i*arum ⟨*ex*⟩ lege Iulia et Titia. Inst. 1, 20 pr.

§ 185. Failing every other form of guardian, at Rome a guardian is appointed under the lex Atilia by the praetor of the city and the major part of the tribunes of the people, called an Atilian guardian: in the provinces, a guardian is appointed by the president of the province under the lex Julia and Titia.

§ 186. Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet, tutor dari potest; item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex his legibus tutor petendus est; qui desini*t* tutor esse, posteaquam aliquis ex testamento tutor esse coeperit. Inst. 1, 20, 1.

§ 186. Accordingly, on the appointment of a testamentary guardian subject to a condition, or on an appointment which is not to commence till after a certain time, during the pendency of the condition and before the time has come, a substitute is appointed by these magistrates; also, when the appointment of a testamentary guardian is not subject to a condition, so long as no heir has entered under the will, a temporary guardian may be obtained under those statutes, whose office will determine as soon as the guardian becomes entitled under the will.

§ 187. Ab hostibus quoque tutore capto ex his legibus tutor peti debet; qui desinit tutor esse, si is qui captus est in ciuitatem reuersus fuerit:

§ 187. On the hostile capture of a guardian the same statutes regulate the appointment of a substitute to continue in office until the return of the captive; for if the

nam reuersus recipit tutelam iure postliminii. Inst. 1, 20, 2.

captive returns he recovers the guardianship in virtue of his rehabilitation.

§ 188. Ex his apparet, quot sint species *t*utelarum. si uero quaeramus in quot genera ha*e* species d*i*ducantur, longa erit disputatio; nam de ea re ualde ueteres dubitauerunt, nosqu*e* diligentius hunc tractatum executi sumus et in edicti interpretatione et in his libris quos ex Q. Mucio fecimus. hoc *t*antisper sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Q. Mucius; alii tria, ut Ser. Sulpicius; alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.

§ 188. The foregoing statement shows the various forms of guardian: the question of the number of orders to which these forms may be reduced involves a long discussion, for it is a point on which the ancient jurists differed greatly; and as I have examined it at length, both in my interpretation of the edict and in my commentary on Quintus Mucius, for the present occasion it may suffice to observe that some, as Quintus Mucius, make five orders; others, as Servius Sulpicius, three; others, as Labeo, two; others make as many orders as there are forms of guardian.

§ 188. In the time of Justinian there were three forms of guardian,—testamentary, or appointed by will; statutory, or prescribed by the law in case of intestacy; and magisterial (dativus), or appointed by the magistrate, in default of a testamentary or statutory guardian. The other forms of guardian had become obsolete, except a kind of fiduciary one, Inst. 1, 19, in consequence of the change in legislation.

For an account of Q. Mucius Scaevola (Consul B.C. 95) and Servius Sulpicius Rufus (Consul B.C. 51), who may be regarded as the fathers of Roman jurisprudence, see Roby, Intr. to Justinian's Digest, pp. cvi and cxi.

DE MVLIERVM TVTELA.

§ 189. Sed inpuberes quidem in tutela esse omnium ciuitatium iure contingit, quia id naturali ration*i* conueniens est, ut is qui perfectae aetatis non sit, alterius tutela regatur. nec fere ulla ciuitas est, in qua non licet parentibus liberis suis inpuberibus *testamento* tutorem dare; quamuis, ut supra diximus, soli ciues Romani uideantu*r* liberos suos in potestate habere. Inst. 1, 20, 6.

§ 189. The wardship of children under the age of puberty is part of the law of every state, for it is a dictate of natural reason that persons of immature years should be under the guardianship of another, in fact there is scarcely any state which does not permit a parent to nominate a testamentary guardian for his children under the age of puberty, though, as we have before stated, only citizens of Rome appear to be invested with parental power.

§ 190. Feminas uero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse uidetur; nam quae uulgo creditur, quia leuitate animi plerumque decipiun*tur* et aequum erat eas tutorum auctoritate regi, magis speciosa uidetur quam uera; mulieres enim, quae perfectae aetatis sunt, ips*ae* sibi negotia tractant et in quibusdam causis dicis gratia tut*or* interponit au*ctoritatem* suam, saepe etiam inuitus auctor fieri a praetore cogitur.

§ 190. But why women of full age should continue in wardship there appears to be no valid reason; for the common allegation, that on account of levity of disposition they are readily deceived, and that it is therefore right that they should be controlled by the sanctionary power of a guardian, seems rather specious than true, for women of full age administer their own property, and it is a mere formality that in some transactions their guardian interposes his sanction; and in these cases he is frequently compelled against his own will to give his sanction.

§ 191. Unde cum tutore nullum ex tu*te*la iudicium mulieri datu*r*; at ubi pupillorum pupillarumue negotia tutores tractan*t*, ei post pubertatem tutelae iudici*o* rationem reddunt.

§ 191. Accordingly, a woman has not the tutelary action against her guardian; whereas since the guardians of youthful wards, both male and female, administer their wards' property, they are liable to be sued on account of such administration when the ward has come to the age of puberty.

§ 192. Sane patronorum et parentum legitimae tutelae uim aliquam habere intelleguntur eo, quod hi neque ad testamentum faciendum neque ad res mancipi alienandas neque ad obligationes suscipiendas auctores fieri coguntur, praeterquam si magna causa alienandarum rerum mancip*i* obligationisque suscipiendae interueni*at*; eaque omnia ipsorum causa constituta sunt, ut, quia ad eos intes*ta*tarum mortuarum hereditates pertine*nt*, neque per testamentum excludantur ab hereditate neque alienatis pr*e*tiosioribus rebus susceptoqu*e* aere alieno minus locuples ad eos hereditas *per*ueniat.

§ 192. The statutory guardianship of patrons and parents is not purely ineffective, as they cannot be compelled to give their sanction to a will or to the alienation of mancipable property, or to the undertaking of obligations, unless there are very weighty reasons for the obligation or the alienation; but this rule is in their own interest as heirs of intestacy, and is designed to prevent their loss of the estate by testamentary disposition, or the diminution of its value by debt or by alienation of a considerable portion.

§ 193. Apud peregrinos non similiter ut apud nos in tutela *sunt* feminae; sed tamen ple-

§ 193. In other countries, though not under the same tutelage as at Rome, women are generally

rumque quasi in tutela sunt; *ut ecce* lex Bithynorum, si quid mulier *contra*hat, maritum *auctorem* esse iubet aut filiu*m* eius puberem.

subject to a quasi tutelage: for instance, the law of Bithynia requires the contract of a woman to be sanctioned by her husband or by a son above the age of puberty.

As women were capable of administration, the functions of the guardian, which in the case of infants were either administrative or sanctionative, in the case of women were confined to sanctioning. Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt: mulierum autem tutores auctoritatem dumtaxat interponunt, Ulp. 11, 25. It is transparent that the wardship of women after full age was not designed to protect their own interests, but those of their heirs apparent, their agnates. Originally the authorization of the guardian was not sufficient to validate the will of an independent woman: it was necessary that she should first break the ties of agnation, and separate from her family by means of a coemption (with her guardian's sanction) and subsequent remancipation and manumission. She then, with the sanction of the manumissor, in his character of fiduciary guardian, could make a valid will. In the time of Gaius, Hadrian having abolished the necessity of coemption, to make a valid will an independent woman only required the sanction of her guardian, 2 § 112, and Claudius, as we have seen, had put an end to agnatic guardianship, § 171.

When a woman was liberated from the administrative control of her guardian, and the guardian had no longer any interest in the succession to her property, the simplest course would have been to declare her dispositions valid without his sanction—to declare her no longer a ward. But with characteristic conservatism of forms, Roman law, to avoid the open change, declared the auctoritas still necessary, but made it compulsory instead of voluntary—gave the ward a power of extorting it from the guardian, 2 §§ 80-85. So the act whereby a testamentary heir accepts an inheritance was originally absolutely voluntary: but when trusts (fidei commissa) were introduced, and the heir as trustee or fiduciarius by groundlessly refusing to make the necessary aditio, which in this case was the merest form, could produce intestacy, and thus deprive the beneficiary, fidecommissarius, or cestui que trust of the provision destined for him by the bounty of the testator: instead of declaring the aditio of the heres unnecessary to the acquisition of the fortune by fideicommissarius; or that in such a case the beneficiary should be deemed to be a direct substitutus of the heres; or that the vexatious refusal of the heres should be deemed to be an aditio and

restitutio; the legislator ordained that the heres should be compelled to make aditio in order to complete the title, 2 § 258, comm. Again, the terms of the security given by the guardian (rem pupilli salvam fore) against dilapidation of the estate of the ward made the responsibility of the guardian depend on his actual administration; so that he was not responsible if the estate went to ruin in consequence of his total abstention from the performance of his duties. To protect the ward against this contingency, instead of altering the formula of the satisdatio, and making the liability of the guardian depend on his appointment and not on his acting; the law compelled him to proceed to some act of guardianship, in order to bring him under the unchanged terms of his security; Dig. 46, 6, 4, 3. In all these and other cases a compulsory act was substituted for a voluntary act for the sake of giving the law an outward appearance of continuity. At last, at some period before the epoch of Justinian, the tutelage of women above the age of puberty had ceased in form as well as in substance, and no sanction of a guardian, whether voluntary or compulsory, was required.

It is to be observed, that as women were gradually enfranchised from their disabilities, they also forfeited some of their original privileges. It was a rule of the administration of justice that while error of fact might be pleaded to defend a person against the consequences of his own acts or omissions, no one should be allowed to allege an error of law, Dig. 22, 6, 9 pr. An exception however was made in favour of minors, of soldiers, of the utterly uneducated (rustici), and of women. Against their ignorance of rules of law, particularly those rules of jus civile which are not, like rules of jus gentium or naturale, the almost self-evident dictates of reason and common sense, they were relieved by a branch of the praetor's extraordinary jurisdiction, called in integrum restitutio, a power of cancellation and rescission, in cases of manifest collision between law and equity; §§ 197–200, comm. This privilege of women was partially abrogated by a constitution of the Emperor Leo, A.D. 472; Cod. 1, 18, 13. 'To prevent the indiscriminate revocation by women of all their contracts on the ground of omission of error, be it enacted, that ignorance of law, whereby a woman is damnified in her right or property, shall only be a title to relief in those cases where previous statutes have sanctioned such relief.'

From § 189 it might appear that Gaius referred the institution of guardianship to the code of jus gentium. We have, however, quoted from the Institutes, §§ 142, 154, comm., a passage which ascribes it to jus civile: and, indeed, no institution confined in its operation almost entirely to cives, can be supposed to belong to

jus gentium or natural law. Moreover, the law of guardianship has been most variable, not only if we look to different countries, but also if we look at different periods in the same country; and the praetor or chancellor or other authority that has had the supervision of guardians has always exercised a great latitude of discretion; features which again forbid us to ascribe the rules of wardship to any comparatively immutable code of nature. Tutela was in fact an old Roman institution, by which the gens or familia maintained control in its own interest over its weaker members, who were not subject to patria potestas. It is possible that this control was at first exclusively exercised by the gens, in whom the ownership of all land occupied by the gentiles may have been vested, and that agnatic as well as testamentary guardianship was first instituted by the law of the Twelve Tables, whereby patricians and plebeians were put on an equality in respect of private rights. That the gens was in the habit of taking charge in some way of lunatics and insane persons we know from the words of the Twelve Tables, which have come down to us—'Si furiosus exit, ast ei custos ne exit, adgnatûm gentiliumque in eo pecuniaque eius potestas est.' Cf. Muirhead, Roman Law, §§ 26, 28.

QVIBVS MODIS TVTELA FINIATVR.

§ 194. Tutel*a* autem liberantur ingenuae quidem trium ⟨*liberorum iure libertinae uero quattuor, si in patroni*⟩ liberorumue eius legitima tu*tela* sint; nam ceterae quae alterius generis tutores habent, [uelut Atilianos aut fiduciarios,] trium liberorum iure tutela liberantur.

§ 194. Guardianship is terminated for a freeborn woman by title of being mother of three children, for a freedwoman if under statutory guardianship of her patron or his children by being mother of four children: those who have other kinds of guardians, Atilian or fiduciary, for instance, are liberated from wardship by being mothers of three children.

§ 195. P*ot*est autem pluribus modis libertina alterius generis ⟨*tutorem*⟩ habere, ueluti si a femina manumissa sit; tunc enim e le*ge* Atilia petere debet tutorem, uel in prouinc⟨*iis e lege Iul*⟩ia et Titia; nam in patronae tutela esse non potest.

§ 195. There are various ways by which a freedwoman may have other kinds of guardians: for instance in case of her manumission by a woman, when she must request a guardian under the lex Atilia, or, in the provinces, under the lex Julia and Titia, since a female patron cannot be her guardian.

§ 195 *a*. Item si ⟨*a*⟩ masculo manumissa ⟨*fuerit*⟩ et auctore eo coemptionem fecerit, deinde remancipata et manu-

§ 195 *a*. Also on manumission by a male, if with his sanction she makes a coemption, and then is remancipated and manumitted,

missa sit, patronum quidem habere tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius dicitur.

for the patron then ceases to be guardian, and is replaced by the second manumitter, who is called a fiduciary guardian.

§ 195 *b*. Item si patron*us eiusue filius* in adoptionem se dedit, debet liberta *e lege Atilia uel Iulia et* Titia tut*orem* petere.

§ 195 *b*. Also on the adrogation of her patron or his son she must demand a guardian under the lex Atilia or Titia.

§ 195 *c*. Similiter ex isdem legibus petere debet tutorem *li*berta, si patronus decesserit nec ullum uirilis sexus liberorum in familia re*liquer*it.

§ 195 *c*. Similarly in compliance with the same laws she must demand a guardian on the decease of her patron without leaving any male descendant in the family.

§ 196. Masculi *autem cum* puberes esse coeperi*nt*, tutela liberantur. p*uberem autem* Sabinus quidem et Cassius ceterique nostri praeceptores eum esse putan*t*, qui habitu corporis pubertatem ostendit, id est eum qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam, cuius aetatis puberes fiunt; sed diuersae scholae auctores annis putant pubertatem aestimandam, id est eum puberem esse existimant *qui* XIIII *annos expleuit.*——| Inst. 1, 22 pr.

§ 196. For males the attainment of the age of puberty is a release from wardship. Puberty, according to Sabinus and Cassius and the other authorities of my school, depends on physical development, that is, on capacity of generation; or in case of impotence, eunuchs for instance, on the completion of the age which usually implies capacity of generation. The other school hold that puberty is to be exclusively measured by age, that is to say, that it should always be deemed to be attained on the completion by a male of his fourteenth year.

§ 196. All jurists agreed that in the case of impotence, whether natural or acquired, some fixed date must be assumed as the conventional period of puberty. The Sabinian rule appears to be preserved in a passage of Paulus: Spadones eo tempore testamentum facere possunt quo plerique pubescunt, id est, anno decimo octavo, 3, 4 *a*, 2. Fourteen was assumed to be the average age of puberty; but it was too early, even in the southern climes subject to Roman legislation, for a minority of constitutions which advance more slowly to maturity. Eighteen was supposed to be sufficiently postponed to include most of these cases of retarded development. We have already, in treating of adrogation, § 106, commentary, met with the phrase, plena pubertas, denoting eighteen years of age.

DE CVRATORIBVS.

(25 *uersus in C legi nequeunt*)
§ 197. ——— aetatem peruenerit, in qua res suas tueri possit; sicut apud peregrinas gentes custodiri superius indicauimus. Inst. 1, 2, 3.

§ 198. Ex isdem causis et in prouinciis a praesidibus earum curatores dari *solent*. Inst. l. c.

§ 197. After release from tutelary guardianship the estate of a minor is managed by a curator until he reaches the age at which he is competent to attend to his own affairs, and the same rule obtains in other nations, as we have already mentioned.

§ 198. Under similar circumstances the president of a province appoints a curator.

DE SATISDATIONE TVTORVM VEL CVRATORVM.

§ 199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut deminuantur, curat praetor, ut et tutores ⟨*et*⟩ curatores eo nomine satisdent. Inst. 1, 24 pr.

§ 200. Sed hoc non est perpetuum; nam et tutores *testamento* dati satisdare non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; et curatores, ad quos no*n* e lege curat*io* pertinet, sed ⟨*qui*⟩ uel a consule uel a praeside prouinciae *dan*tur, plerumque non coguntur satisdare, scil*i*cet quia satis hon*esti* *electi* sunt. Inst. l. c.

§ 199. To protect tutelary wards and those having a curator from the destruction or waste of their property by their guardians and curators, it is the function of the praetor to require such guardians and curators to give security for due administration.

§ 200. But this is not without exception, for testamentary guardians are not compelled to give security, as their integrity and vigilance have been approved by the testator; and curators who have not been appointed by any statute, but by the nomination of a consul or praetor or president of a province, are generally not required to give security, their selection being deemed sufficient evidence of their trustworthiness.

§ 197. In English jurisprudence there is no distinction corresponding to that between tutor and curator, impubes (pupillus) and minor (adolescens). Infant and minor are in English synonymous; guardianship continues to the attainment of majority, i.e. to the completion of twenty-one years of age; and after that the young of both sexes are considered to be capable of taking care of themselves, and are free from further control. At Rome wardship (tutela) ceased at puberty, or, as the law came to be defined, at the age of fourteen

for males and twelve for females, ages at which the young manifestly continue to stand in need of guidance and protection, though according to Roman law they were then fully competent to administer their own property, and to dispose of it by will.

Such protection was provided for them partly by two statutes, partly by praetorian legislation. (1) The lex Plaetoria, or Laetoria, was as old as Plautus, who about 186 B.C. makes a youth exclaim: Lex me perdit quinavicenaria; metuunt credere omnes, Pseudolus, 303. 'The statute with its five and twenty years prevents my getting credit.' It made a criminal offence, and subject to a criminal prosecution (judicium publicum, Cic. de Nat. Deor. 3, 30), what Cicero calls circumscriptio adolescentium, De Off. 3, 15; i.e. over-reaching and circumventing persons below the age of twenty-five. Such is Savigny's interpretation of judicium publicum, Vermischte Schriften, 18. Ihering maintains that judicium publicum denotes in this passage not a criminal prosecution but an actio popularis; i.e. a civil action that could be instituted not only by the Minor but by a common Informer: and he quotes Dig. 26, 10, 1, 6 (cf. Inst. 1, 26, 3) Consequens est ut videamus qui possunt suspectos (tutores) postulare, et sciendum est quasi publicam esse hanc actionem, hoc est, omnibus patere, Dig. 12, 2, 30, 3, where quasi publica actio means an action similar to actio popularis, Geist des Römischen Rechts, § 52, nn. 158, 159. The circumscription of a minor, like fraudulent mal-administration by a guardian, rendered the person convicted thereof infamis. A contractor with a minor might secure himself against the penalties of the law, if a curator were nominated by the praetor to advise the minor in respect of the special transaction.

(2) As the lex Plaetoria was only applicable in cases of fraud (dolus malus, Cic. de Off. 3, 15), the protection it gave to minors was inadequate: accordingly, the praetor, besides allowing a minor to set up the plea of minority when sued in an action, proclaimed in his edict that he would relieve minors who had been damaged in consequence of inexperience and improvidence by rescission and cancellation of the proceeding (in integrum restitutio). To obtain this relief it was not necessary to prove any fraud on the part of the person who contracted with the minor.

(3) A person who wished to bring an action against a minor could compel him to obtain from the praetor a curator for the purpose of defending the particular suit; whose office ceased as soon as the special litigation terminated. Marcus Aurelius, under whom Gaius flourished, enacted that any minor who chose should be able to obtain from the praetor a general curator (generalis curator), who then should be charged with the general administration (generalis administratio) of his estate, Capitolinus, 10. In

view of this option of the minor, Justinian could still say: Inviti adolescentes curatores non accipiunt praeterquam ad litem, Inst. 1, 23, 2. 'Unless they choose, minors need not have a curator, except for a suit.' A minor who had a curator could not aliene without the consent of his curator: he could incur an obligation without the consent of his curator, subject to his right of in integrum restitutio, though, unless he had a curator, persons would not be very willing to contract with him. Even the existence of a curator did not deprive the minor of his right of restitution, but of course it could not be obtained so readily as when he acted without the advice of a curator. The praetor allowed actiones utiles against a curator, corresponding to those to which a tutor was subject.

The tutor and curator were entirely separate functionaries: when women were under perpetual tutelage, a woman might have both a tutor and a curator. The curator of a minor must be distinguished from an agent (procurator), a person invested with certain rights and duties, which will be explained when we examine the different kinds of contract. An agent is governed by the instructions (mandatum) of his principal: a minor is under the direction of his curator: the employment of an agent is a private matter, purely voluntary on the part of the principal; the curator, like the tutor, holds a public function, and having one is in some cases involuntary on the part of the minor.

How exactly the lacuna in § 197 should be filled up is doubtful. We do not know what is the previous passage referred to.

Besides minors, lunatics and prodigals of whatever age were committed to the charge of curators. The cura of lunatics and prodigals is, indeed, older than that of minors, being regulated by the Twelve Tables, which directed that the nearest agnate should be curator of a lunatic, and manage the estate of an interdicted prodigal. In later times it was usual for the praetor or praeses provinciae to appoint a curator after inquest (ex inquisitione). Paulus has preserved the form of words in which the prodigal was interdicted: 3, 4 *a*, 7. 'By custom the praetor interdicts a prodigal from the administration of his property in the following terms: As thy profligacy is wasting the estate of thy father and ancestors, and bringing thy children to destitution, I therefore interdict thee from the control of thy patrimony, and from all disposition of property.'

In integrum restitutio, a branch of the praetor's equitable jurisdiction, and one of the most remarkable cases of his cognitio extraordinaria, has been mentioned more than once, and deserves here a brief explanation. Restituere in a general sense denotes any

undoing of a wrong, any replacement of a person or his right in his or its original condition, whether by the voluntary act of the wrongdoer, or after action brought, and then either at the invitation of the judge (in virtue of the clause, ni restituat, 4 § 47), or in execution of a judicial sentence. But in the phrase we are examining it denotes the act, not of a private party, but of a magisterial authority. In integrum restitutio is the restitution by the praetor of a person to his original legal condition, in cases when some injury has been done to him by operation of law. The interposition in such cases of the highest Roman minister of justice bears some analogy to the use made of the prerogative of the Crown in our own early legal history. The function of thus overruling the law where it collided with equity was only confided to the highest magisterial authority, and even in his hands was governed by the principle that he was only supposed to act in a ministerial, not in a legislative capacity. Five grounds or titles (justae causae) to extraordinary relief (extraordinarium auxilium) were recognized and enumerated in the edict, Dig. 4, 1: intimidation (metus), fraud (dolus malus), absence, error, minority (aetatis infirmitas). Two, however, of these titles, fraud and intimidation, had additional remedies in the ordinary course of procedure (ordo judiciorum), where they were recognized as grounds of exception and personal action. Thus we find that a praetor called Octavius introduced the actio and exceptio metus mentioned by Cicero, Verr. 2, 3, 65, where the actio metus is called Formula Octaviana, and that the famous Aquilius Gallus, the colleague of Cicero, introduced the exceptio and the actio doli, Cic. de Natura Deorum, 3, 30.

The chronological order of the remedy by Action and the remedy by Restitution, like that of the historical relation of interdict to action, is disputed. Savigny, §§ 112, 191, 199, holds that the remedy by Restitution was older than the remedy by Action; while Vangerow, § 185, holds that the remedy by Action was older than the remedy by Restitution. As remedies they were very different in character, the effect of a grant of restitution being simply to reinstate a person in a legal right, which he had lost, not to give him damages on account of the violation of a right.

There are three conditions of Restitution: (1) The first condition is a Laesion by the operation of law, i. e. a disadvantageous change in civil rights or obligations brought about by some omission or disposition of the person who claims relief. This disadvantage may either consist in positive loss of acquired property, or in missing a gain which would not have involved, on the part of another, a positive loss of acquired property. An instance of such a laesion would be the loss of property by omitting to interrupt a usucapio

or by omitting to claim an inheritance, or by making some omission in procedure. Cf. 4 § 57.

(2) A second condition is some special or abnormal position of the person who claims relief when such special circumstance is the cause of the loss which he has suffered. Thus a minor may be relieved against an injudicious bargain, but not against the casual destruction of the thing he has purchased, for this loss was not occasioned by his minority or inexperience. Such abnormal positions (justae causae) are compulsion, fraud, minority, absence, error.

(3) A third condition of relief is the absence of various disentitling circumstances. Thus relief is granted against the effect of legal dispositions and omissions, but not against the effect of delicts. Again the extraordinary relief of in integrum restitutio is not granted when the courts of law can administer an adequate remedy.

Originally capitis minutio of a defendant was ground for a restitution, 3 § 84; but this ceased at an early period to be anything more than a formal case of restitution; for rescission of the adrogation, adoption, emancipation, whereby a person's debts were extinguished, was granted as a matter of course without any previous investigation (causae cognitio), and without any period of prescription like that which limited the right to pray for restitution.

This was, originally, annus utilis, and in the time of Justinian, quadriennium continuum or four calendar years, which begin to run, not from the date of the Laesion, but from the termination of the Causa, i. e. the abnormal position—minority, absence, compulsion, deception, error—whereby the Laesion was occasioned. Such at least is Savigny's and Windscheid's opinion. Vangerow holds that, except in Minority and Absence, prescription begins to run from the date of Laesion, 4 §§ 110-113, comm.

Of the five titles to restitution that we have enumerated, four, namely, intimidation, fraud, absence, error, implying equality of rights in all parties, belong to the law of Things or actions; title by minority, implying a privileged class or inequality of rights, belongs to the law of Persons.

As we shall have occasion in the next book, §§ 1-14, comm., to use the expression Rerum universitas, it may seem appropriate, before we quit the law of Persons, to give some explanation of the contrasted term, Personarum universitas. A University of persons in the private code is a fictitious or juristic person, composed generally by the union of a number of individuals, and capable like a natural individual (singularis persona) of the various rights and duties of property, that is to say, of potestas, patronatus, dominium,

servitus, obligatio; and the power of suing and being sued (cf. Sohm, §§ 37, 38).

Some Universities have a visible existence or representation in a number of individual members, and are then called Corporations. An essential incident of Corporations is that their rights are not vested in the aggregate of individuals, but in the ideal whole, regarded as distinct from the members of which it is composed. Examples of such Corporations are municipalities (civitas, municipium, respublica, communitas), colleges of priests, of Vestal Virgins, corporations of subordinate officials, e.g. lictors, notaries (scribae, decuriae), industrial guilds, e.g. smiths, bakers, potters, shipowners, mining companies (aurifodinarum, argentifodinarum, salinarum, societas), contractors for the revenue (vectigalium publicorum societas), social clubs (sodalitates, sodalitia), friendly societies (tenuiorum collegia) (cf. Mommsen, de Collegiis et sodaliciis Romanorum; Karlowa, Röm. Rechtsg. 2 § 2).

Other juristic persons, not so visibly embodied in any natural individuals, e.g. temples, churches, hospitals, almshouses, or any other beneficent aims personified, are called by civilians, not Corporations, but Foundations.

The state, though not strictly speaking a juristic person, as invested with rights of property, was called in the time of the republic Aerarium. Under the first emperors, when the public treasure was divided between the emperor and the senate, the senate, as in a proprietary position representing the republic, was called Aerarium, while the treasury of the emperor was called Fiscus. At an uncertain date, but after the time of M. Aurelius, when all power was undisguisedly absorbed by the emperor, and the public chests were united, the terms Aerarium and Fiscus lost their distinctive meanings, and we find them used convertibly in the compilations of Justinian. The Fiscus, as a proprietary unit, came to have a special legal status and to be invested with peculiar privileges.

Juristic persons, though invested with rights of property, being mere fictions or ideal unities, are, strictly speaking, incapable of making a declaration of intention; for how can a fiction have an intention? It is true that slaves could acquire property and active obligations for their proprietors; but a slave could not aliene property, nor be himself subject to a civil obligation, nor be a party to a suit: and therefore Universities could not make such dispositions by means of their slaves. In this respect they resemble infants and lunatics; and as infants and lunatics must be represented by their guardians and curators, so juristic persons must be represented by the agents designated and defined by their constitution. The temporary representative of a Corporation, for the purpose of suing and being sued, was called Actor; a permanent representative for this

purpose was called Syndicus, Gaius in Dig. 3, 4, 1. The constitutions of juristic persons are too various to admit of any general definition. But a juristic person was only bound by the act of its representative, in so far as such juristic person was benefited thereby. Dig. 12, 1, 27.

Although a Universitas is said to hold common property, the relation of the members of a Universitas must not be identified with that of Co-proprietors (communio). A co-proprietor is the separate proprietor of an undivided ideal portion, which he can aliene, mortgage, and otherwise dispose of; and which, by requiring a partition (actio communi dividundo), he can always reduce to a real portion: whereas the whole of the common property can only be dealt with if the co-proprietors are unanimous. Members of a Universitas, on the contrary, cannot demand a partition; and dispositions of the property of the Universitas can only be made by the vote of a majority, sometimes only by a majority of two-thirds of the members.

Every juristic person was originally incapable of being instituted heir, as Pliny mentions in the case of municipalities: Nec heredem institui nec praecipere posse rempublicam constat, Epist. 5, 7. 'Neither an inheritance nor a legacy by praeceptio (which implies that the legatee is also heir, 2 § 217) can be left to a municipality.' Juristic persons were not, as is sometimes stated by Roman jurists, subject to this incapacity simply because, owing to the idea of an artificial person not having yet been distinctly formed, they were regarded as personae incertae, 2 § 238, but also because, being fictions, they were incapable of entering on an inheritance (aditio), which involves acceptance on the part of the heir, and excludes representation. First the senate, disregarding this difficulty, allowed municipalities to be instituted heirs by their own liberti, Ulpian 22, 5: and subsequently the Emperor Leo, A. D. 469, gave to municipalities the capacity of being instituted heir by any testator, Cod. 6, 24, 12. No general enactment extended this capacity to all Corporations, but some received it as a special privilege.

Originally municipalities, like other juristic persons, were incapable of taking bequests (legata), but subsequently they were declared capable by Nerva and Hadrian, Ulpian 24, 28; 2 § 195: and this capacity was extended to Collegia, Templa and Churches, Dig. 34, 5, 20. Towns were also capable of taking successions by fideicommissum, Ulpian 22, 5.

Under Christian legislation Pious Foundations (pia corpora) were made capable of taking hereditas and legatum: and testamentary dispositions of hereditas and legatum, that would otherwise have been void by the rule avoiding devises to incerta persona, e.g. a devise

to the poor of a town who, not forming a corporation, were not persona certa, acquired validity from the pious purpose of the disposition.

The origin and extinction of Universitates, Collegia, &c. required the assent of the Emperor. The special privileges and incapacities which we have indicated, by their analogy to status, may perhaps justify the mention of Universities in the law of Persons. Savigny, §§ 85–102.

COMMENTARIVS SECVNDVS

DE REBVS SINGVLIS ET DE RERVM UNIVERSITATIBVS

DE RERVM DIVISIONE.

§ 1. *Superiore commentario de iure personarum* | exposuimus; modo uideamus de rebus; quae uel in nostro patrimonio sunt uel extra nostrum patrimonium habentur.

Inst. 2, 1 pr.

§ 1. In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.

§ 2. Summa itaque rerum diuisio in duos articulos diducitur: nam aliae sunt diuini iuris, aliae humani.

§ 2. The leading division of things is into two classes: things subjects of divine, and things subjects of human right.

§ 3. Diuini iuris sunt ueluti res sac*rae* et religiosae.

Inst. 2, 1, 7.

§ 3. Subjects of divine right are things sacred and things religious.

§ 4. Sacrae sunt quae diis superis consecratae sunt; religiosae quae diis Manibus relictae sunt. Inst. 2, 1, 8.

§ 4. Sacred things are those consecrated to the gods above; religious, those devoted to the gods below.

§ 5. Sed sacrum quidem hoc solum existimatur quod *ex* auctoritate populi Romani consec*rat*um est, ueluti lege de ea re lata aut senatusconsulto facto. Inst. l. c.

§ 5. Sacred things can only become so with the authority of the people of Rome, by consecration in pursuance of a law or a decree of the senate.

§ 6. Religiosum uero nostra uoluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. Inst. 2, 1, 9.

§ 6. A religious thing becomes so by private will, when an individual buries a dead body in his own ground, provided the burial is his proper business.

§ 7. Sed in prouinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum uel usumfructum habere uidemur; utique tamen etiamsi non sit religiosu*m*, pro reli*gi*oso habetur.

§ 7. On provincial soil, according to most authorities, ground does not become religious as the dominion belongs to the people of Rome or the Emperor, and individuals only have possession or usufruct, but such places, though not properly religious, are to be regarded as quasi-religious.

§ 7 *a*. Item quod in prouinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

§ 8. Sanctae quoque res, uelut muri et portae, quodammodo diuini iuris *sunt*. Inst. 2, 1, 10.

§ 9. Quod autem *di*uini iuris est, id nullius in bonis est; id uero, quod humani *iuris est, plerumque alicuius in bonis est: potest autem et nullius in bonis esse; nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt.* Inst. l. c.

§ 9 *b*. ——

(8 *fere uersus in C legi nequeunt*)

——| *e domino.

§ 10. Hae autem quae humani iuris sunt, *aut pu*blic*ae* s*un*t aut priuatae.

§ 11. Quae publicae sunt, null*ius ui*dentur in bonis esse; ipsius enim uniuersitatis *esse* *c*redunt*ur*. priuatae sunt quae singulorum homin*um sunt*.

§ 7 *a*. Just as provincial soil, in default of the authorization of the people of Rome, is rendered by consecration not sacred, but quasi-sacred.

§ 8. Sanctioned places are to a certain extent under divine dominion, such as city gates and city walls.

§ 9. Things subject to divine dominion are exempt from private dominion; things subject to human dominion are generally subject to private dominion, but may be otherwise: for things belonging to an inheritance before any one has become heir have no actual owner.

§ 10. Things subject to human dominion are either public or private.

§ 11. Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion.

DE REBVS INCORPORALIBVS.

§ 12. Quaedam praeterea res corporales sunt, quaedam in⟨*corporales*⟩. Inst. 2, 2 pr.

§ 13. Corporales hae ⟨*sunt*⟩ quae tangi possunt, uelut fundus homo uestis aurum argentum et denique aliae res innumerabiles. Inst. l. c.

§ 14. Incorporal*es sunt* q*uae* tangi non possunt, qualia sunt ea quae iure consistunt, sicut hereditas usus fructus obligationes quoquo modo contractae. nec ad rem per⟨*tinet, quod in hereditate res corporales con-*⟩

§ 12. Again, things are either corporeal or incorporeal.

§ 13. Things corporeal are tangible, as land, a slave, clothing, gold, silver, and innumerable others.

§ 14. Things incorporeal are intangible; such as those which have an existence simply in law as inheritance, usufruct, obligation, however contracted. For though an inheritance comprises things corporeal, and the fruits of land

tinen*tur* et fructus qui ex fundo percipiun*tur* corporales *sunt*, et quod ex aliqua obligatione nobis debe*tur*, *id* plerumque corpo*rale est*, *ueluti* fundus homo pecunia; nam ipsum ius successionis et ipsum ius u*ten*di fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urba|norum et rustico*rum*. —— |—— altius tollend*i* ——|—— luminibus uicini aed——non extollen|di, ne luminibus uicini officiatur. | item fluminum et stilicidiorum——ius, ut—|—— *in are*am—|———|———|—— ius aquae ducendae—|———

Inst. 2, 2, 2 and 3.

enjoyed by a usufructuary are corporeal, and obligations generally bind us to make over the conveyance of something corporeal: land, slaves, money; yet the right of succession, the right of usufruct, and the right of obligation are incorporeal. So are the rights attached to property in houses and land. The following are rights attached to property in houses; the right of raising a building and thereby obstructing the lights of a neighbouring building; the right of prohibiting a building being raised, so that one's lights may not be interfered with; the right of letting rain-water fall in a body or in drops on a neighbour's roof or area; the right of having a sewer through a neighbour's area, or a window in a neighbour's wall (cf. Epit. 2, 1, 3). The following are rights attached to property in land: iter, a right of way on foot or horseback; actus, a right of way for ordinary carriages; via, a right of paved way for heavy-laden wagons; pecoris ad aquam appulsus, a right of watering cattle; aquae ductus, a right of conveying water through the tenement of another.

Having treated of the law of Persons (unequal rights), we proceed to the law of Things (equal rights), and the first right which Gaius intends to discuss is the right called Dominion. Seduced, however, by an ambiguity of the word Res, which signifies either a right or the subject of a right, his opening statements (§§ 12–14) are deplorably confused.

In order to see our way, let us first examine Res as denoting the Object of a right. Every right implies, as we have stated, a duty; and every right or duty implies at least two persons, one of whom is entitled to the right while the other is liable to the duty. The immediate OBJECT of every right is an act or forbearance of the person who is liable to the duty. But the act or forbearance generally relates to some body, that is, to some tangible portion of the external world, whether a thing or a person. This body, accordingly, may be called the mediate, indirect, or secondary Object of

the right. The secondary object of a right, however, is not always a body; it may be corporeal or incorporeal. For instance, dominium over land is a right to forbearance on the part of all the world from molestation of the owner in dealing with the land. A servitude, say a right of way, is a right to forbearance on the part of all the world from molestation of the person entitled when he passes over certain land. A contractual right is a right to a positive act or forbearance on the part of a determinate person, say, to the conveyance or delivery of a certain piece of land. In these cases, land, the secondary object of the right, is something corporeal. So, too, when a person is the object of a right; for instance, a child or a gladiator, 3 § 199, in the possession (detention or custody) of the parent or employer, and whose removal from such possession engenders in the removing party an obligation ex delicto. But in primordial rights, the object, at least as distinguished from the two parties in whom the right and duty respectively vest, is something incorporeal. A man has a right to forbearance on the part of all the world from molestation in his life, health, locomotion, honour. These objects of the right are incorporeal. Other rights, apparently, have no determinate object, corporeal or incorporeal, to which they are correlated. In a right to the services of a menial or gladiator, for instance, it would be hard to indicate any secondary or corporeal object to which the obligation of the menial or gladiator relates.

It is clear that no division of Objects of right will coincide with a classification of Rights: while, if we divide Res in the metaphysical sense of the World, or Being, or Existence (a sense suggested by the differentiae, corporalis, and incorporalis), Dominium, like all other rights, will be a member of the branch res incorporales, or Ownership. Gaius, however, wishes us to identify Dominium with res corporalis, and to make Obligation and the fractions of Dominium (servitutes), and even some forms of Dominium (e. g. hereditas), members of the contra-distinguished branch, res incorporalis. (Cf. 3 § 83, omnes ejus res incorporales et corporales quaeque ei debita sunt.)

Gaius was probably not entirely responsible for this confusion of thought, which, perhaps, was too deeply inwoven in the formulae of Roman jurisprudence to be easily eliminated by an institutional writer. E. g. the declaration (intentio) of a real action (in rem actio) was of the form: Si paret (1) illum fundum—(2) illam hereditatem—actoris esse. (Cf. 4 § 3 In rem actio est cum aut corporalem rem intendimus nostram esse aut jus aliquod nobis competere.) Now as hereditas is a jus successionis, § 14, it is clear that, if the second formula is correct, the first formula ought to be, not, Si paret illum fundum—but, Si paret illius fundi dominium—

actoris esse. To meet this and similar inaccuracies of the framers of the formularies, Gaius is misled into identifying in res corporalis two things completely disparate, Right and the corporeal thing or Secondary Object of a right. There is a similar confusion in English law, chattels, tenements, and hereditaments being sometimes used to denote the objects, movable or immovable, of certain rights, sometimes the rights over those objects: and just as Res is divided into Corporalis and Incorporalis, so Hereditaments are divided into Corporeal and Incorporeal; although, if the term denotes a right, both branches are equally incorporeal: if it denotes the secondary object of a right, both branches are equally corporeal.

We shall find hereafter, 4 §§ 138-170, comm., that the position of POSSESSION in Roman jurisprudence—whether it belongs to the department of JUS IN REM or of OBLIGATIO EX DELICTO—is a moot question; but at present we need do no more than notice the existence of the controversy. We need also only to indicate a division of rights and duties into SINGLE rights and duties, and AGGREGATES of rights and duties (UNIVERSITAS JURIS), such as Hereditas. A UNIVERSITAS JURIS includes Obligations as well as Rights, Jus in personam as well as Jus in rem, being in fact the succession of one person to which another person succeeds. But in spite of the diverse character of the elements of which it is composed, the JURIS UNIVERSITAS itself, or the ideal whole of these various elements, is regarded, e. g. in Hereditatis petitio, as a real Right, not an Obligation; as a Jus in rem, not a Jus in personam.

As Gaius thought that he could obtain the idea of Dominium by a division of Res into corporales and incorporales, so he seems to have thought that he could distinguish private dominium, the special department which he intends to examine, from other forms of dominium by a further division of Res. The phrases res divinae, res humanae, res communes, res publicae, res privatae, do indeed suggest the notion that res privatae is a specific member of the genus Res; but the appearance is fallacious. Very little reflection will convince us that res divinae, res publicae, res privatae are not a division of the OBJECTS of property (res); for the same thing, a piece of ground, for instance, may be an object of divine or public or private dominion; but merely a division of proprietors. In res divinae, the only doubtful case, the gods were deemed to be proprietors. Sed et illa interdicta quae de locis sacris et de religiosis proponuntur veluti proprietatis causam continent, Dig. 43, 1, 2, 2. 'The interdicts respecting sacred and religious places protect a quasi-property.'

The division of the objects of right by their physical differences, the only way in which they can be divided, though only of subor-

dinate importance, and though it cannot furnish the distinctions of Dominium and Obligation, nor of Public and Private dominium, yet has a considerable influence on jurisprudence, and demands a certain amount of attention. Thus ocean, air, and light, as opposed to the earth, are by their nature essentially res communes. Being incapable of appropriation, they have not been appropriated and are held in communism. Again, in wild animals, as opposed to tame, property is only coextensive with possession. On the difference between specific and generic things, or things consumed by use, quae pondere numero mensurave constant, and things not consumed by use, is founded the distinction between the contracts of mutuum and commodatum. Cf. 3 § 90. On the same difference of specific and generic things are founded different rules relating to the contract of sale, 3 §§ 139-141, comm.; and the distinction of movables and immovables founds important differences in Roman and other systems of law.

The phrases in nostro patrimonio and extra nostrum patrimonium, § 1, are apparently equivalent to alicujus in bonis and nullius in bonis, § 9, and to the expressions we meet elsewhere, in commercio and extra commercium.

Of res communes, or things such as air and running water, which sometimes come under discussion (cf. Inst. 2, 1, 1 Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris) but are not mentioned by Gaius, we may observe, that they only fall within the province of positive law, as belonging to the jurisdiction of each particular state.

All the things within the territory of a given state are subject to its dominion (dominium eminens), that is, are res publicae in a general sense of the term. Of these things it allows the dominium over some to vest in private individuals for their own advantage, while it retains the dominium over others in itself as if it were a corporation or collective person (personarum universitas). This gives us a division of all things into res privatae and res publicae in a narrower sense of the term. We must note, however, that the dominium of the state is not exactly similar to private dominium, that is to say, is not dominium in the proper sense or the sense in which the word is used in civil law. For the civil dominium of private persons is a right protected and sanctioned by a political superior, whereas a sovereign state is by hypothesis in subjection to no superior. A state, then, can only be said to have dominium in a modified sense of the word, that is, so far as it is not restrained by any positive law of any superior from using and dealing with certain things as it may please.

Of things which are objects of public dominion, some are vested

immediately in the state, others in subordinate persons, single or corporate, magistrates, for instance, and municipalities, to be held by such persons for various public purposes. Among these we might also reckon res divini juris, though as dedicated to religious purposes, such things were regarded by the Romans as no man's property, §§ 3–6.

Another division of res publicae is into res in patrimonio populi and res non in patrimonio populi. Under the former are included the public treasury, the public domain, public slaves, bequests lapsing to the state (caduca) or res privatae otherwise devolving on the state; in other words, all things of which the state as universitas retains not only the property but also the use and disposition (res enim fiscales quasi propriae et privatae principis sunt, Dig. 43, 8, 2, 4). The other class includes high roads, public rivers, public buildings, &c., that is, all things of which the property is in the community and the use in the members of the community. Or we may say that the property is in the universitas, but it is subject to a personal servitude (usus) vested in all the private members of that universitas (singuli, universi).

Not only res publicae but res privatae may be thus subject. For instance, the banks of public rivers and the trees thereupon are the property of the adjacent proprietors; but the navigators of these rivers have the right of mooring, landing, unlading, and using the banks in various other ways, Inst. 2, 1, 4.

Ownership (dominium) absolute or pre-eminently so called, may be defined as a right of unlimited duration, imparting to the owner a power of indefinite enjoyment or use, and a power of aliening from all who in default of alienation by him might succeed by descent; or, in other words, from all successors interposed between himself and the sovereign as ultimus heres. It is accordingly sometimes said to consist of jus utendi, fruendi, abutendi; where abusus includes the power of consumption or destruction, of dereliction, and of disposition (sale, exchange, gift, mortgage, lease, &c.). Another element is equally important, the right of exclusion (jus prohibendi). Another is the jus transmittendi, i. e. the right of leaving the integral right, in the absence of Disposition, to those whom he would presumably have wished to be his successors.

Besides ownership (dominium) Roman law recognizes various kinds of partial property, real rights over an object of which the dominium is in another person, called jura in re or jura in re aliena, rights which fall short of absolute property but approximate to it in various degrees. Such rights, which are limitations of ownership, are servitudes, § 14, mortgage (pignus), superficies, and emphyteusis. These may all be regarded as detached

fractions of ownership, portions of the right of dominion taken from the proprietor and vested in another person. Servitudes are explained by Justinian in the parallel passage of his Institutes (2, 3–5), and, together with the other jura in re aliena, demand here a brief notice.

Servitudes are (1) praedial or real (praediorum), that is, belong to a person as owner of a certain house or land (praedium dominans) in respect of a house or land belonging to another proprietor (praedium serviens), or (2) personal (personarum), that is, are vested in a person without relation to his ownership of praedium dominans, and being thus inseparably attached to him they are inalienable and determine at his death. (Compare in English law the division of easements into easements appurtenant to land and easements in gross.)

Praedial servitudes are servitudes in the strictest sense, being contrasted with ownership by their precise and definite circumscription. Ownership (dominium) is a right against the world which gives to the party in whom it resides a power of dealing with the subject which is not capable of exact definition. Servitude is such a right against the world as gives to the party in whom it resides a power of using the subject which is susceptible of precise description. It is a definite subtraction from the indefinite powers of use and exclusion which reside in the owner; or a right against the owner and the rest of the world to make certain use of a thing or prohibit certain uses.

Praedial servitudes are (1) rustic, relating to land, or (2) urban, relating to houses. Urban servitudes are further subdivided into Positive or Affirmative and Privative or Negative. The following considerations will show the meaning of this division and its origin in the nature of Property.

Servitudes are limitations of, or deductions from, another person's ownership or dominium. Dominium contains, among other elements, (A) certain powers of action (jus utendi), and (B) certain powers of exclusion (jus prohibendi). Restrictions on these powers will be (*a*) a certain necessitas non utendi, and (*b*) a certain necessitas patiendi. Correlative to these duties on the part of the owner of the servient tenement will be certain rights of the owner of the dominant tenement, viz. (α) a certain jus prohibendi, and (β) a certain jus utendi, or in other words, (α) a certain negative servitude, and (β) a certain affirmative servitude. As it happens that all the servitudes which public policy has recognized in relation to land are of an Affirmative character (except Si concedas mihi jus tibi non esse in fundo tuo aquam quaerere, minuendae aquae meae gratia, Dig. 8, 1, 15 pr. though, as Windscheid remarks, there is no reason why this should not also be an urban servitude—) and relate to some transient action (except Ut tugurium mihi habere liceret in tuo, scilicet si habeam pascui servitutem aut pecoris appellendi, ut, si

hiems ingruerit, habeam quo me recipiam, Dig. 8, 3, 6, 1), they may be called jus faciendi: while those relating to houses are both Affirmative and Negative (jus prohibendi). Affirmative Urban servitudes, implying some permanent structure, may, in conformity with classical usage (e. g. jus tignum immissum habendi) for the sake of distinction from the Rural servitudes, be called jus habendi: they resemble them in the generic character that they are each a jus utendi.

(1) Instances of Rural servitude (jus faciendi) are iter, or jus eundi, right of way for beast and man on foot or on horseback over the servient tenement to the dominant tenement; actus or jus agendi, right of way for ordinary carriages (not for heavy-laden wagons); via (or jus vehendi ?), right of paved way for heavy-laden wagons; aquae haustus, the right of drawing water from a private spring; aquae ductus, the right of conveying water over the servient tenement; pecoris ad aquam appulsus, the right of watering cattle; jus pecoris pascendi, the right of pasturing cattle; jus calcis coquendae, the right of burning lime; jus cretae eximendae, the right of quarrying for chalk; jus arenae fodiendae, the right of taking sand; jus silvae caeduae, the right of cutting wood in a wood suitable for the purpose.

(2) Instances of affirmative urban servitudes are jus tigni immittendi, the right of inserting a beam in a neighbour's wall; jus oneris ferendi, the right of resting a weight on a neighbour's wall or column (this servitude involves on the part of the servient owner the positive obligation of repairing the servient wall (refectio); whereas all other servitudes, as real rights, are contradistinguished from obligations or personal rights, by corresponding to the merely negative duty of abstention; cf. Windscheid, Pandekten, 1 § 211 *a*, note 3); jus protegendi, the right of projecting a roof over the soil of a neighbour; jus stillicidii recipiendi or avertendi or immittendi, the right of directing the rainfall on to a neighbour's roof or area; jus cloacae immittendae, the right of making a sewer through the area of a neighbour; servitus luminum or jus luminis immittendi, the right of having a window in a neighbour's wall; jus officiendi luminibus vicini, the reacquired right of an owner to diminish the light of a neighbour; jus altius tollendi, the reacquired right of an owner to increase the height of a structure, § 31; the right of storing fruit in his villa, ut fructus in vicini villa cogantur coactique habeantur; of placing quarried stones on his land, posse te cedere jus ei esse terram, rudus, saxa, jacere posita habere, et ut in tuum lapides provolvantur ibique positi habeantur, Dig. 8, 3, 3, 1 and 2. Vangerow holds that Aquaeductus, implying jus habendi, though it is servitus Rustica as to the land from which water is taken, is servitus Urbana as to the land over which water is conveyed.

(3) Instances of jus prohibendi are jus altius non tollendi, the right of forbidding a neighbour to raise the height of his buildings; jus ne prospectui officiatur, the right of having a prospect unintercepted; jus ne luminibus officiatur, the right of having the access of light to one's windows obstructed; jus stillicidii non avertendi, the reacquired right of prohibiting my neighbour from discharging his rainfall into my area. Inst. 2, 3.

Personal servitudes (Inst. 2, 4 and 5) are rights of a less limited character in respect of user, but more restricted as to duration than praedial: instances are Habitatio, the right of occupying a house; Usus, the right of using a thing and consuming its immediate fruits or products, without the right of letting the thing or selling its products; of acquiring, in other words, its rent and profits, which may be regarded as its mediate or secondary fruits. Fructus, usually called Ususfructus, the further right of leasing the thing and selling its fruits. Habitatio, Usus, Ususfructus were usually, though not invariably, life interests, and, unlike real servitudes, implied Detention of the object; Possession of it, as opposed to Detention (4 §§ 138–170, comm.), remaining in the proprietor. For the modes of creating and vindicating servitudes, see §§ 28–33; 4 § 88, comm. Servitus was the only jus in re aliena belonging to jus civile. The other jura in re aliena, subsequently instituted, were pignus, superficies and emphyteusis.

Pignus or hypotheca, as developed by praetorian law, was the right of a creditor in a thing belonging to his debtor, maintainable against any one, in order to secure satisfaction of his debt. The praetorian action, by which the creditor could claim possession of the thing pledged, corresponding to the vindicatio of the owner, is called actio quasi Serviana in rem or hypothecaria. See 3 §§ 90, 91, comm.

Superficies is the right of a person who, having rented land for building on a long or perpetual lease, has built a house on it, which according to jus gentium, by the rule of Accession, is the property of the proprietor of the soil; cf. Inst. 2, 1, 29. The Praetor, however, recognized in the superficiarius a jus in re which he protected by an interdict de superficie and an actio in rem utilis.

Jus in agro vectigali or emphyteusis, as this species of right came to be called subsequently to the time of Gaius, from waste lands of the Emperor being let out under this kind of tenancy to be planted or cultivated, was a perpetual lease which transferred to the tenant or emphyteuta most of the rights of the owner. Accordingly he could maintain actio vectigalis in rem against any one to recover possession of the land thus leased to him. See 3 § 145. Although emphyteusis might be of unlimited duration, and was alienable without the consent of the owner, subject to his right of pre-emption, yet the owner had a right of recovering the land for breach of con-

dition, or failing heirs of the emphyteuta, much as the feudal lord of a fee could recover the fief on forfeiture or escheat of the tenant, emphyteusis being even regarded by some as the model on which feudal tenure was instituted. This forfeiture or escheat to the lord of the fee makes property in land theoretically imperfect, like emphyteusis, falling short of ownership. Property in chattels, on the contrary, is not held of a superior, and, therefore, is absolute.

The Profits and Easements of English law generally correspond to the Servitutes of Roman law. But the principle: Servitutium non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat, Dig. 8, 1, 15, 1: 'Servitudes are not a right to a performance but to a permission or forbearance:' would exclude from the class of Servitudes some members of the class of Profits; e. g. Rents, which are said to lie in render, i. e. to involve a performance of the party burdened, not in prender, i. e. not to consist in an act of the party entitled. Roman law adhered strictly to the principle that Real rights, or rights against the world, can only correlate to negative duties, duties of forbearance; and that rights correlating to positive obligations, or duties of performance, can only be Personal; i. e. can only regard a particular individual and his universal successors.

§§ 14 *a*–27. Having described the various kinds of real right (jus in rem), i. e. dominium and its fractions (jura in re), we proceed to the TITLES of real rights, that is to say, the events to which these rights are annexed by the law; in other words, the modes prescribed by the law by which such rights may be acquired; in other words, the legal definitions of the classes of persons in whom such rights are declared to be vested.

The Titles of real rights are divisible into Titles by which single real rights are acquired and Titles by which aggregates of rights (universitates jurum) are acquired.

Titles by which single real rights are acquired are divisible into Titles sanctioned by the civil law (jus civile) and Titles sanctioned by natural law (jus gentium, jus naturale), natural law denoting the rules of Roman law introduced by praetors, jurists and statutes, as consonant to the general reason of mankind.

Titles to ownership by civil law are mancipatio, in jure cessio, usucapio, and others which will be mentioned. Titles by natural law are traditio, occupatio, accessio, and others which will be mentioned, § 35. We commence with Titles by civil law.

RERVM CORPORALIVM ADQVISITIONES CIVILES.

§ 14 *a*. —— *aut mancipi sunt aut* nec mancipi. | Mancipi *sunt*——| item aedes in

§ 14 *a*. Things are further divided into mancipable and not mancipable; mancipable are land and

Italico solo——|————|——— *serui*|*tutes* praediorum urbanorum nec mancipi *sunt*. |

1 § 120; Ulp. 19, 1.

houses in Italy; tame animals employed for draught and carriage, as oxen, horses, mules, and asses; rustic servitudes over Italian soil; but urban servitudes are not mancipable.

§ 15. Item stipendiaria praedia et tributaria nec mancipi | sunt. sed quod diximus——| mancipi esse——|——statim ut nata sunt mancipi esse putan*t*; Nerua uero et Proculus et ceteri diuersae scholae auctores non aliter ea mancipi esse putant, quam si domita sunt; et si propter *n*imiam feritatem domari non possunt, tunc uideri mancipi esse incipere, cum ad eam aetatem peruenerit, qu*a* domari solent.

§ 15. Stipendiary and tributary estates are also not mancipable. According to my school animals which are generally tamed are mancipable as soon as they are born; according to Nerva and Proculus and their followers, such animals are not mancipable until tamed, or if too wild to be tamed, until they attain the age at which other individuals of the species are tamed.

§ 16. *Item* ferae bestiae nec mancipi sunt uelut ursi leones, item ea animalia quae fere bestiarum numero sunt, ueluti elephanti et cameli; et ideo ad rem non pertinet, quod haec animalia etiam collo dorsoue domari so*lent*; nam n*e* *nomen* quidem eorum animalium illo tempore ⟨*notum*⟩ fuit, quo constituebatur quasdam res mancipi esse, quasdam n*ec* mancipi.

§ 16. Things not mancipable include wild beasts, as bears, lions; and semi-wild beasts, as elephants and camels, notwithstanding that these animals are sometimes broken in for draught or carriage; for their name was not even known at the time when the distinction between res mancipi and nec mancipi was established.

§ 17. Item fere omnia quae incorporalia sunt nec mancipi sunt, exceptis seruitutibus praediorum rusticorum; nam eas mancipi esse constat, quamuis sint ex numero rerum incorporalium.

§ 17. Also things incorporeal, except rustic servitudes on Italian soil; for it is clear that these are mancipable objects, although belonging to the class of incorporeal things.

§ 18. Magna autem differentia est inter mancipi res et nec mancipi.

§ 18. There is an important difference between things mancipable and things not mancipable.

§ 19. Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem.

§ 19. Complete ownership in things not mancipable is transferred by merely informal delivery of possession (tradition), if they are corporeal and capable of delivery.

§ 20. Itaque si tibi uestem uel aurum uel argentum tradidero siue ex uenditionis causa siue ex donationis siue quauis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim.

§ 20. Thus when possession of clothes or gold or silver is delivered on account of a sale or gift or any other cause, the property passes at once, if the person who conveys is owner of them.

§ 21. In eadem causa sunt prouincialia praedia, quorum alia stipendiaria alia tributaria uocamus. stipendiaria sunt ea, quae in his prouinciis sunt, quae propriae populi Romani esse intelleguntur; tributaria sunt ea, quae in his prouinciis sunt, quae propriae Caesaris esse creduntur. Inst. 2, 1, 40.

§ 21. Similarly transferable are estates in provincial lands, whether stipendiary or tributary; stipendiary being lands in provinces subject to the dominion of the people of Rome; tributary, lands in the provinces subject to the dominion of the Emperor.

§ 22. Mancipi uero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod autem ualet ⟨*mancipatio, idem ualet et in iure cessio.*

§ 22. Mancipable things, on the contrary, are such as are conveyed by mancipation, whence their name; but surrender before a magistrate has exactly the same effect in this respect as mancipation.

§ 23. *Et*⟩ mancipatio quidem quemadmodum fiat, superiore commentario tradidimus.

§ 23. The process of mancipation was described in the preceding book (1 § 119).

§ 24. In iure cessio autem hoc modo fit: apud magistratum populi Romani, ueluti praetorem, is cui res in iure ceditur rem tenens ita dicit HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO; deinde postquam hic uindicauerit, *praetor interrogat* eum qui cedit, an contra uindicet; quo negante aut tacente tunc ei qui uindicauerit, eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis apud praesides earum.

§ 24. Conveyance by surrender before a magistrate (in jure cessio) is in the following form: in the presence of some magistrate of the Roman people, such as a praetor, the surrenderee grasping the object says: I SAY THIS SLAVE IS MY PROPERTY BY TITLE QUIRITARY. Then the praetor interrogates the surrenderor whether he makes a counter-vindication, and upon his disclaimer or silence awards the thing to the vindicant. This proceeding is called a statute-process; it can even take place in a province before the president.

§ 25. Plerumque tamen et fere semper mancipationibus utimur. quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate apud

§ 25. Generally, however, and almost always the method of mancipation is preferred; for why should a result that can be accomplished in private with the assistance of our friends be prosecuted

praetorem aut apud praesidem prouinciae agere.

§ 26. Quodsi neque mancipata neque in iure cessa sit res mancipi
(6 *uersus in C legi nequeunt*)
——|*plena possessio concessa——|ex formula qua hi qu ——|——|——| fructus na——|.

§ 27. Item adhuc i——|
(4 *uersus in C legi nequeunt*)
——|non fuissent——|
(7 *uersus in C legi nequeunt*)
——s——|——| est quo nomine——|——ere uel——| praedium——|dem ulla libera ciuitas——*admo*|nendi sumus —— | esse, prouincialis soli nexum non e—— | significationem solum *Italicum* mancipi *est*, pro|uinciale nec mancipi est. aliter enim ueteri lingua a|——mancipa—|.

with greater trouble before the praetor or president of the province?

§ 26. If neither mancipation nor surrender before the magistrate is employed in the conveyance of a mancipable thing . . . .

§§ 14 *a*–23. Mancipable things—things taken by the hand and so alienable—were at first, probably, the more important accessories of a farm, that is, slaves and beasts of burden—oxen, horses, mules and asses (1 § 120), land itself in Italy and rural servitudes attaching to such land being subsequently made mancipable.

These, the objects of principal value to an agricultural community, became alienable by means of the formal proceeding by bronze and balance, called mancipation, which Gaius says (1, 119) is an imaginary sale.

In its origin, however, mancipation appears to have been not an imaginary, but a genuine sale for valuable consideration. The introduction of coined money by making the weighing of the bronze in the scales a formality first gave the proceeding an appearance of unreality, but in order to maintain its original character, the Twelve Tables, which were passed at the time when this important monetary change took place, expressly declared that no property should pass by mancipation, unless the price was actually paid to the mancipating party or security given him for it (cf. Inst. 2, 1, 41 Venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato: quod cavetur etiam lege duodecim tabularum)—where traditae

is an evident Tribonianism for mancipatae. But this law was afterwards evaded by juristic ingenuity, the practice of paying only a nominal sum—a single sesterce—being held to be a sufficient compliance with it. This made it possible to use mancipation as a mere conveyancing form. Even in the case of genuine sales, it was found advantageous only thus to pay a nominal sum in the mancipation itself and to make the payment of the purchase money something entirely apart, for by this means the mancipating party in fact escaped the liability imposed on him by the Twelve Tables of paying, as warrantor of the title (auctor), double the price to the other party to the transaction in case of the latter being evicted (cf. Cic. pro Mur. 2, 3, in Caec. 19, 54), and it had the further advantage that the purchaser was enabled to acquire ownership by the mancipation before he had paid the actual purchase money (cf. Muirhead, Roman Law, § 30; Sohm, pp. 51, 61). How, by means of the nuncupation and by collateral fiduciary agreements, mancipation was adapted to effect various legal purposes, may be seen in other parts of the text and commentary.

The form of mancipation (1, 119) shows its archaic origin. If, as has been thought by many modern writers, the witnesses to it originally represented the five classes of the Roman people, mancipation, at least in its ultimate form, cannot have been earlier than the Servian constitution, by which this division of the people was made. The advantage of requiring the presence of a number of citizens to bear testimony to important transfers of property in an age when writing was not in common use is apparent.

§§ 24–26. In jure cessio—the other mode of transfer peculiar to Jus Civile, and so likewise confined to Roman citizens, is an adaptation of the legis actio per vindicationem to conveyancing purposes, depending for its operation on the collusive admission by the defendant of the supposed plaintiff's claim (confessus pro judicato est). This fictitious process, which is not so primitive in character as mancipation, though it was also recognized by the law of the Twelve Tables, must have been introduced to circumvent the law in order to effect objects unattainable by direct means, such as the manumission of slaves. Though Quiritary ownership could be thus conveyed, it was, for the reason given in § 25, rarely employed for this purpose. But for creating or transferring some kinds of rights surrender before a magistrate was essential, §§ 30, 34.

In jure cessio or surrender before a magistrate cannot fail to recall to an English lawyer two similar modes of alienation that recently existed in English jurisprudence, alienation by Fine and alienation by Recovery, both of which, like in jure cessio, were based on a fictitious action; in both of which, that is to say, although the parties did not really stand in the relation of adverse

litigants, the alienee was supposed to recover an estate by process of law. By a Fine, an action commenced against the alienor and at once terminated by his acknowledging the right of the alienee, a tenant in tail could aliene the fee simple, so far at least as to bar his own issue. By a Recovery, a tenant in tail could convey an absolute estate in fee. This was an action supposed to be, not like a Fine immediately compromised, but carried on through every regular stage to the conclusion; whereby the alienee recovered judgement against the alienor, who in his turn recovered judgement against an imaginary warrantor whom he vouched to warranty (cf. laudat auctorem, 3 § 141, comm.).

Res nec mancipi, that is all objects of individual ownership, other than res mancipi, were the only things allowed to pass in complete ownership (pleno jure) simply by tradition, § 19.

This informal mode of alienation did not, like mancipatio, in jure cessio, and usucapio, belong to Jus Civile, but to Jus Gentium, § 65; and was of later introduction than these.

The tradition or informal delivery of some res nec mancipi must, however, have been common from the earliest times, though such tradition would have been regarded at first merely as a delivery of possession, to be protected by the law of theft, not as a title of ownership, to be asserted by vindicatio. At a later period, however, in order to facilitate commerce, tradition became by the influence of jus gentium a mode of acquiring ownership in things which did not belong to the privileged class of res mancipi. By tradition, which is a transfer of possession, ownership may be also transferred, if the transferor is himself owner; otherwise conformably to the principle 'Nemo plus juris transferre potest, quam ipse habet'—possession only passes, bona fide possession, if the transferee knows nothing of his defective title, malâ fide, if he is aware of it. If we consider Surrender before a Magistrate, Mancipation, Tradition, we shall see that they are only three forms of one identical title, Alienation. The substance or essence of the title, the intention on the one side to transfer property, on the other to accept it, is the same in all three; it is only the adventitious, or accidental, or evidentiary portion of the title in which they differ.

Although delivery of possession, like the solemnities of mancipation and surrender, is, as compared with the will or intention of the parties, only an evidentiary and declaratory part of the title; yet both parcels, delivery of possession, as well as agreement, are indispensable in the transfer of ownership. 'Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur,' Cod. 2, 3, 20. 'Tradition and usucapion, not bare agreement, operate as a transfer of ownership.' Tradition, which is only applicable to

corporeal things, is usually effected by some physical act of appropriation, but it may take place without any such actual delivery being made at the time. This occurs when a vendor agrees to hold the property he sells on account of, or as agent of, the purchaser (constitutum possessorium), or when a person already holding a thing on account of the vendor, e. g. as a deposit, or loan, agrees to purchase it (traditio brevi manu). (Inst. 2, 1, 44.)

We have spoken of tradition as a title whereby ownership was acquired. Tradition, however, was only an element, usually the final element, of the complex mode of acquisition, to which it gives its name. To be capable of passing property, delivery must be accompanied by another element, usually an antecedent element, some contract of sale or other legal ground, which is evidence of an intention to aliene. 'Nunquam nuda traditio transfert dominium, sed ita si venditio vel aliqua justa causa praecesserit, propter quam traditio sequeretur,' Dig. 41, 1, 31 pr. It is clear that bare delivery, or transfer of physical control, without any further element of Title, cannot pass Dominium, for in Loan for Use (commodatum) such transfer merely passes what may be called Detention without Possession; in Pledge (pignus) it passes what may be called derivative Possession; in Deposit it usually passes Detention alone, but sometimes Possession also, though in this case also it is derivative Possession, not Possession of the thing as one's own. (4 §§ 138-170, comm.) The cases in which Ownership (Dominium) is passed by Tradition may be reduced to three classes, traditio donandi animo, traditio credendi animo, and traditio solvendi animo. In the first, it simply confers ownership on the donee; in the second, it confers ownership on the transferee, and subjects him to an obligation; in the third, it confers ownership on the transferee, and discharges the transferor of an obligation. In the two latter cases, i. e. tradition by way of loan, as of money (mutui datio), and tradition by way of payment (solutio), the disposition or justa causa accompanying tradition contains much that is unessential to the transfer of dominium or ownership, the only absolutely essential element being the intention of the parties to convey and take dominium. In Donation the justa causa traditionis consists solely of this essential element. The justa causa, then, which must accompany delivery, must involve the animus or voluntas transferendi dominii, and this, apparently, is given as the whole of the matter in a passage of Gaius quoted in Digest: 'Hae quoque res, quae traditione nostrae fiunt, jure gentium nobis adquiruntur; nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi,' Dig. 41, 1, 9, 3. Tradition is a mode of acquisition, 'in accordance with Jus Gentium, for it is a plain dictate of natural justice, that the

will of an owner to transfer his ownership to another should be allowed to take effect.'

In one case, as we have seen, the operation even of contract and delivery combined was limited by the Twelve Tables, namely, in Sale. Hence it came about that tradition did not operate a transmutation of property without a further condition—payment of the purchase money, unless the sale is intended to be a sale on credit, or satisfaction is made to the vendor in some way. Inst. 2, 1, 41. Delivery sometimes precedes the intention to transfer, for instance, in a conditional sale; in which case the transfer of property may be suspended until the condition is fulfilled. The intended transferee may be an incerta persona, for instance, when money is scattered among a mob by a praetor or consul (missilium jactus). Inst. 2, 1, 46.

Tradition in Roman law was never fictitious; it was always an actual delivery of a power of physical or corporeal control, so the delivery of the keys of a house is not something symbolical or fictitious, but a real transfer of a power of exercising dominion. The restriction of tradition, as a mode of acquiring ownership, to res nec mancipi had previously to the time of Gaius lost much of its importance, the Praetor protecting one to whom a res mancipi, such as land, had been delivered, as if Quiritarian ownership of it had been obtained by usucapion, § 41. In Justinian's time Tradition had entirely superseded the civil titles of surrender before the magistrate and mancipation: the ancient distinction between res mancipi and res nec mancipi being no longer in existence.

§ 21. This section contains the clearest statement which we possess of the technical distinction between the two classes of provinces instituted by Augustus. Those which were not under the direct control of the Princeps were technically under the control of the Senate and People (compare Dio Cassius, liii. 12); but, as the People was mainly represented by the Senate, they are often spoken of as Senatorial Provinces. The provinces of Caesar were far more numerous; about the time of Gaius they numbered thirty-one—twenty-one being governed by Legati pro praetore, nine by Procurators, and Egypt by its Praefect—while the Public Provinces under Proconsuls numbered but eleven. See Marquardt, Staatsverwaltung, i. p. 494. The attempt to keep these departments distinct was a failure; and the control of the Public Provinces by the Princeps was now very considerable, especially in matters of jurisdiction. But the technical difference between the two kinds of provinces was still preserved in the reign of Marcus Aurelius. Thus we find that Emperor causing provinces to be transferred from the one to the other category in obedience to military considerations, and asking the Senate to vote money to him from the Aerarium, the treasury

which contained the dues from the Public Provinces (Vita Marci, 22, Dio Cassius, lxxi. 33).

During the Republic the taxes paid by provincials had been called stipendium—a word which points to the view originally taken that these revenues were meant to meet military expenses; for stipendium means pay for the army. During the Principate the word tributum came also to be used for imperial taxes; but this passage of Gaius shows that stipendium was still employed for the dues paid by the Public Provinces. The distinction between stipendiary and tributary provinces is perhaps based on a difference in the mode of collecting, not of levying, the taxes. It seems that in the Public Provinces the taxes were still collected by the local governments themselves and paid to the Quaestors, whereas in Caesar's Provinces the Procurators came into direct contact with the tax-payer. The mode of collection was in the second case direct, in the first indirect. It is also possible that the ownership of the soil in Caesar's Provinces was regarded as vested in the Princeps, that of the soil in the Public Provinces as vested in the Roman state (see Mommsen, Staatsrecht, ii. p. 1088), and this distinction may be implied in the two classes of provincialia praedia mentioned by Gaius.

The mode of taxation was uniform for the whole Empire, and the assessments were made at intervals by the Emperor's officials. The taxes were either imports on the land (tributum soli) or on the person (tributum capitis). The land-tax was in most provinces paid either in money or grain, more usually in the former, although in certain minor districts it was delivered in the form of other produce. The personal tax might be one on professions, income, or movable property. Occasionally it was a simple poll-tax, this latter burden being probably imposed on those provincials whose property fell below a certain rating.

§ 24. The legati Caesaris or Presidents of imperial provinces had originally on jurisdiction to preside over legis actio, but this was afterwards conferred upon them, Tac. Ann. 12, 60.

§ 26. Gaius probably explained in this place the effect of tradition of a res mancipi, § 41, and then went on to treat of the jus commercii. Ulp. 19, 4, 5 Mancipatio locum habet inter cives Romanos et Latinos coloniarios Latinosque Junianos eosque peregrinos quibus commercium datum est. Commercium est emendi vendendique invicem jus.

RERVM INCORPORALIVM ADQVISITIONES CIVILES.

§ 28. ⟨*Res*⟩ incorporales traditionem non recipere manifestum est.

§ 29. Sed iura praediorum

§ 28. Incorporeal things are obviously incapable of transfer by delivery of possession (traditio).

§ 29. But while before a magis-

urbanorum in iure cedi ⟨*tantum*⟩ possunt; rusticorum uero etiam mancipari possunt.

trate urban servitudes can only be created by surrender before a magistrate; rural servitudes may either be acquired by this method or by mancipation.

§ 30. Vsusfructus in iure cessionem tantum recipit. na*m* dominus proprietatis alii usumfructum in iure cedere pot*est*, ut ille usumfructum habeat et ipse nudam proprietatem *retineat*. ipse ususfructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius s*u*um retine*t*; creditur enim ea cessione nihil agi.

§ 30. Usufruct can only be created by surrender. A usufruct surrendered by the owner of the property passes to the surrenderee, leaving the bare property in the owner. A usufruct surrendered by the usufructuary to the owner of the property passes to the latter and is merged in the ownership. Surrendered to a stranger it continues in the usufructuary, for the surrender is deemed inoperative.

§ 31. Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipationem et in iure cessionem recipiunt. alioquin in prouincialibus praediis siue qu*is* usumfructum siue ius eundi agendi aquamue ducendi uel altius tollendi aedes aut non tollendi, ne luminibus uicini officiatur, ceteraque similia iura constituere uelit, pactionibus et s*t*ipulationibus id efficere potest, quia ne ipsa quidem praedia mancipationem aut ⟨*in*⟩ iure cessionem recipiun*t*.

§ 31. These modes of creating usufruct are confined to estates in Italian soil, for only these estates can be conveyed by mancipation or judicial surrender. On provincial soil, usufructs and rights of way on foot, horseback, and for carriages, watercourses, rights of raising buildings or not raising, not obstructing lights, and the like, must be created by pact and stipulation; for the lands themselves, which are subject to these servitudes, are incapable of conveyance by mancipation or surrender before a magistrate.

§ 32. Se*d* cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per in iure cessionem constitui posse.

§ 32. In slaves and other animals usufruct can be created even on provincial soil by surrender before a magistrate.

§ 33. Qu*od* autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, qua*mu*is etiam per mancipationem constitui possit eo quod in mancipanda proprietate detrahi potest; non enim ipse ususfructus manci-

§ 33. My recent statement that usufruct was only constituted by surrender before a magistrate was not inaccurate, although it may in this sense be created by mancipation that we may mancipate the property and reserve the usufruct; for the usufruct itself is

patur, sed cum in mancipanda proprietate deducatur, eo fit ut apu*d* alium ususfructus, apud alium proprietas sit.

not mancipated, though in mancipating the property the usufruct is reserved so that the usufruct is vested in one person and the property or ownership in another.

§ 34. Hereditas quoque in iure cessionem tantum recipit.

§ 34. Inheritances also are only alienable by surrender before a magistrate.

§ 35. Nam si is, ad quem ab intestato legitimo iure pertinet hereditas, in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is cui in iure cesserit, ac si ipse per legem ad here*dita*tem uocatus esset; post obligationem uero si cesserit, nihilo minus ipse heres permanet et ob *id* creditoribus tenebitur, debita uero pereunt eoque modo debitores hereditarii lucrum faciunt; corpora uero eius hereditatis p*ro*inde transeunt ad eum cui cessa est hereditas, ac si ei singula in iure cess*a* fuissent.

§ 35. If the person entitled by the statutory rules of the civil law of intestacy surrender the inheritance before acceptance, that is to say, before his heirship is consummated, the surrenderee becomes heir just as if he was entitled by agnation; but if the agnate surrenders after acceptance, in spite of the surrender he continues heir and answerable to the creditors, his rights of action being extinguished and the debtors to the estate thus discharged of liability without payment, while the ownership in the corporeal objects of the inheritance passes to the surrenderee just as if it had been surrendered in separate lots.

§ 36. Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agi*t*; postea uero quam adierit si cedat, ea accidunt, quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem ⟨*in*⟩ iure cedat.

§ 36. The surrender of an inheritance by a person instituted heir by will before acceptance is inoperative; but after acceptance it has the operation just ascribed to the agnate's surrender of an intestate succession after acceptance.

§ 37. Idem et de necessariis heredibus diuersae scholae auctores existimant, quod nihil uidetur interesse utrum ⟨*aliquis*⟩ adeundo hereditate*m* fiat heres, an inuitus exist*a*t; quod quale sit, suo loco apparebi*t*. sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem.

§ 37. And so has a surrender by a necessary successor according to the authorities of the other school, who maintain that it seems immaterial whether a man becomes heir by acceptance or whether he becomes heir ipso jure, irrespective of his intention (a distinction that will be explained in its proper place): according to my school a necessary heir's surrender of the inheritance is inoperative. [3 § 85.]

§ 38. Obligationes quoquo modo contractae nihil eorum recipiunt. nam quod mihi ab aliquo debetur, id si uelim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum, sed opus est, ut iubente me tu ab eo stipuleris; quae res efficit, ut a me liberetur et incipiat tibi teneri; quae dicitur nouatio obligationis.

§ 39. Sine hac uero nouatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

§ 38. Obligations, in whatever way contracted, are incapable of transfer by either method. For if I wish to transfer to you my claim against a third person, none of the modes whereby corporeal things are transferred is effective: but it is necessary that at my order the debtor should bind himself to you by stipulation: whereupon my debtor is discharged of his debt to me and becomes liable to you; which transformation is called novation of an obligation.

§ 39. In default of such novation he cannot sue in his own name, but must sue in my name as my cognitor or procurator.

§ 28. So incorporeal hereditaments in English law were said to lie in grant, not in feoffment, i. e. to be only conveyable by deed, or writing under seal; whereas corporeal hereditaments were conveyable by feoffment, i. e. by livery of seisin or delivery of possession.

§ 30. Inalienability was no peculiar characteristic of Usufruct and other personal servitudes. Alienation of rights, or singular succession as opposed to inheritance or universal succession, was the exception, not the rule. Dominion over res singulae was alienable, but almost all other rights were intransferable. If we except the case of hereditas legitima delata, § 35, hereditas, as we shall see, was inalienable: and what is said of Urban and Rural praedial servitudes, §§ 29, 30, refers to their creation, not to their alienation. In the law of Persons, Patria potestas, 1 § 134, and Tutela in some cases, 1 § 168, could be transferred but only by surrender before a magistrate (in jure cessio), i. e. a process which feigned that there was no transfer. Manus and mancipium could be extinguished but not transferred [Ihering, § 32], except that, apparently, mancipium could be retransferred to the natural parent or mancipator, 1 § 132.

§ 31. It appears that convention (pactio et stipulatio) alone unaccompanied by tradition or quasi-tradition was capable of creating a right analogous to a Roman servitude in provincial land, to which in jure cessio and mancipatio were inapplicable, in opposition to the principle of Roman law, as stated by some modern writers, that mere agreement can only create at the utmost an obligation (jus in personam), and in order to create a jus in rem must be accompanied by delivery of possession. But in our authorities this principle is confined to res corporales, which alone admit of real tradition. Exceptional instances in which agreement without any further accompaniment

creates a jus in rem, that is, transfers either dominion or jus in re aliena, are hypotheca (see 3 § 91, comm.) and societas omnium bonorum (see 3 § 148). Vangerow, however, holds, § 350, that pactio and stipulatio could not create a genuine servitus, enforceable against the servient person or tenement, but only an Obligatio, enforceable against the contracting party and his heirs: that in the time of Gaius this was all that could be accomplished; but that afterwards, when quasi-traditio of res incorporalis was recognized as practicable, genuine Servitudes could be thus constituted. The distinction between solum Italicum and provinciale was subsequently abolished, and in jure cessio and mancipatio disappeared. In the Institutes of Justinian we are told that both praedial servitudes (Inst. 2, 3, 4) and the personal servitude of usufruct (Inst. 2, 4, 2) are created by pacts and stipulations, nothing being there said of quasi-traditio, as a condition of acquiring servitudes. The combination of pact and stipulation for the purpose has been explained as an amalgamation of foreign and Roman law, a mere pact being recognized by the former, but unless embodied in a stipulation unenforceable by the latter (cf. Sohm, § 69; Dernburg, Pandekten, § 251, n. 16).

§ 32. In accordance with the principle that movables are personal, a Roman could convey movable property by conveyances confined to citizens, wherever such property was situated.

The servitus altius tollendi, or the right of increasing the height of an edifice, is at first sight very enigmatical. My right of increasing the height of my building, and thus obstructing the lights of my neighbour, would seem to be part and parcel of my unlimited rights of dominion: and, if a dispute arose, one would think that the burden of proof would be on my neighbour, who would have to prove a special limitation of my rights as owner of a praedium serviens and a special right residing in himself as owner of a praedium dominans: that is to say, that instead of my having to prove a servitude or jus altius tollendi, my neighbour would have to prove a servitude or jus altius non tollendi. Cum eo, qui tollendo obscurat vicini aedes, quibus non serviat, nulla competit actio, Dig. 8, 2, 9. 'A man who by building obscures his neighbour's lights, unless subject to a servitude, is not actionable.' Altius aedificia tollere, si domus servitutem non debeat, dominus ejus minime prohibetur, Cod. 3, 34, 8. 'A man cannot be prevented from raising the height of his house unless it is subject to a servitude.' The same rule is laid down in English law. The following is perhaps the most probable solution of the problem:

The extinction of Rural and Urban servitudes was governed by different rules. The extinction of a Rural servitude was more easily accomplished than that of an Urban servitude: it was effected by

simple non-user (non utendo) on the part of the dominant property for a period, originally, of two years, afterwards of ten. The extinction of an Urban servitude demanded, besides the negative omission of use on the part of the dominant, a positive possession of freedom (usucapio libertatis) on the part of the servient owner. Gaius (ad Edictum Provinciale, Dig. 8, 2, 6) thus explains the difference: in a servitus ne amplius tollantur aedes, or ne luminibus aedium officiatur, if the windows of the dominant house are closed with masonry there is a non-usus of the servitude on the part of the dominant owner; if at the same time the height of the servient house is raised there is possession of freedom on the part of the servient owner. Or in a servitus tigni immissi, if the dominant owner removes the beam from his neighbour's wall there is on his part non-usus; if the servient owner builds up the orifice in which the beam was inserted, there is on his part usucapio libertatis. Originally Servitudes, like Dominium, could be acquired by Usucapion; and as Usucapion was applied to the extinction of Urban Servitudes, it was regarded by the jurists as a mode of acquiring or of creating an antagonistic servitude. On the extinction of a Rural servitude, the servient property simply recovered its original dimensions: an Urban servitude was a permanent diminution of the servient property, and on its extinction the servient property, instead of dilating to its original size, recovered what it had lost in the shape of the annexation of a contrary servitude. When at an unknown date the Usucapion of servitudes was abolished by a lex Scribonia, an exception was made in favour of these Contrary servitudes, which in fact were not genuine servitudes, but merely the expression of the greater difficulty of extinguishing an Urban servitude. Libertatem servitutium usucapi posse verius est, quia eam usucapionem sustulit lex Scribonia, quae servitutem constituebat, non etiam eam, quae libertatem praestat sublata servitute, Dig. 41, 3, 4, 28. 'The better view is that extinction of servitude by usucapion is admissible, for the usucapion abolished by the lex Scribonia was usucapion whereby a servitude is constituted, not that which liberates by extinction of servitude.' Thus he who laboured under a disability of building (jus altius non tollendi) was regarded on its extinction as having acquired the opposite easement, jus altius tollendi; he who was relieved of the servitus ne luminibus officiatur was regarded as acquiring a jus officiendi luminibus vicini; he who was relieved from the servitus stillicidii avertendi in tectum vel aream vicini was deemed to acquire a jus stillicidii non avertendi, Gaius ad Edictum Provinciale, Dig. 8, 2, 2. It does not appear that the ordinary requisites of Usucapio, titulus and bona fides (§ 61, comm.), were required in this usucapio libertatis.

In usucapio libertatis, a right being acquired, the ten years are

complete on the commencement of the last day: in non-usus, a right being lost, the ten years are not complete till the last day is terminated.

The three servitudes, ne prospectui officiatur, ne luminibus officiatur, ne altius tollatur, are similar in character, but differ in their degree of extension. The servitus ne luminibus officiatur is not so extensive as the servitus ne prospectui officiatur, for that may amount to an obstruction of prospect which does not cause a diminution of light, Dig. 8, 2, 15: but is wider than servitus altius non tollendi, because light may be intercepted by other causes than buildings, by plantation, for instance, though building is the principal means of interception.

Servitus luminum has been already noticed, §§ 1–14, comm., as apparently identical with jus luminis immittendi, i. e. the right of having a window in a neighbour's wall. Luminum servitute constituta id adquisitum videtur ut vicinus lumina nostra excipiat, Dig. 8, 2, 4. 'The servitude of Lights entitles the owner of the dominant house to have a window in the wall of his servient neighbour.'

It appears from the above explanation that the servitus luminum and the servitus ne luminibus officiatur belong to different categories, for the servitus luminum, like the jus officiendi luminibus, belongs to the category of jus habendi; while the servitus ne luminibus officiatur belongs to the category of jus prohibendi.

§ 34. Cf. 3 §§ 85–87. The statement that an inheritance is not mancipable may seem inconsistent with what we are afterwards told of the testament by bronze and balance, § 102. There is, however, no real inconsistency. The subject mancipated in the will by bronze and balance, though a universitas, was not an inheritance—there was no inheritance to mancipate, for nemo est heres viventis—but the collective rights—familia, patrimonium—of the testator.

§ 38. The mode of transferring obligations may be more properly considered hereafter, when we examine the titles by which Jus in personam originates or terminates, 3 §§ 155–162, comm. Gaius glanced at the titles to Hereditas and Obligatio because he was treating of Res incorporales under which they are included; but he should have abstained from discussing Obligatio because he is now dealing with Jus in rem, and he should have abstained from discussing Hereditas because he is now dealing with Res singulae.

§ 40. Sequitur ut admoneamus apud peregrinos quidem unum esse dominium; nam aut dominus quisque est, aut dominus non intellegitur. quo iure etiam populus Romanus

§ 40. We must next observe that for aliens there is only one ownership and only one owner at the same time of a thing, and so it was in ancient times with the people of Rome, for a man had

olim utebatur: aut enim ex iure Qui*ritium* unusquisque dominus erat, aut non intellegebatur dominus. sed postea diuisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere.

either quiritary dominion or none at all. They afterwards decomposed dominion so that one person might have quiritary ownership of an object of which another person had bonitary ownership.

§ 41. N*am* si tibi rem mancipi neque mancipauero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium uero mea permanebit, donec tu eam possidendo usucapias; semel enim inpleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium tua res esse, ac si ea mancipata uel in iure cessa ⟨*esset*.

§ 41. For if a mancipable thing is neither mancipated nor surrendered before a magistrate but simply delivered to a person, the bonitary ownership passes to the alienee, but the quiritary ownership remains in the alienor until the alienee acquires it by usucapion; for as soon as usucapion is completed, plenary dominion, that is, the union of bonitary and quiritary ownership, vests in the alienee just as if he had acquired the thing by mancipation or surrender before a magistrate.

§ 42. *Vsucapio autem*⟩ mobilium quidem rerum anno conpletur, fundi uero et aedium biennio; et ita lege XII tabularum cautum est.

Inst. 2, 6 pr.

§ 42. Usucapion of movables requires a year's possession for its completion, of land and houses, two years' possession, a rule which dates from the law of the Twelve Tables.

§ 43. Ceter*um* etiam earum rerum usucapio nobis conpetit, quae non a domino nobis traditae fuerint, siue mancipi sint eae res siue nec mancipi, si modo eas bona fide acceperimus, cum crederemus eum qui traderet dominum esse.

§ 43. Quiritary ownership of a thing may also be acquired by usucapion, when possession of it has been transferred to one by a person who is not the owner of it, and this is the case in things either mancipable or not mancipable, if they are received in good faith by a person who believes the deliverer to be owner of them.

§ 44. Quod ideo receptum uidetur, ne rerum dominia diutius in incerto essent, cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium, quod tempus ad usucapionem possessori tributum est.

Inst. l. c.

§ 44. The reason of the law appears to be the inexpediency of allowing ownership to be long unascertained, the previous owner having had ample time to look after his property in the year or two years which must elapse before usucapion is complete.

§ 45. Sed aliquando etiamsi maxime quis bona fide alienam

§ 45. Some things, however, notwithstanding the utmost good

est, quod olim rerum hereditariarum possessione *uel*ut ipsae hereditates usucapi credebantur, scilicet anno. lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras uero anno. ergo hereditas in ceteris rebus uidebatur esse, quia soli non est quia neque corporalis est. ⟨*et*⟩ quamuis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur, annua usucapio remansit.

in ancient times the possession of property belonging to the inheritance was held to be a means of acquiring the inheritance itself, and that in a year: for while the law of the Twelve Tables fixed two years for the usucapion of land and one year for the usucapion of other things, an inheritance was held to fall under the category of 'other things,' as it is neither land nor corporeal: and though it was afterwards held that the inheritance itself was not acquirable by usucapion, yet the property belonging to the inheritance, including land, continued acquirable by a year's possession.

§ 55. Quare autem omnino tam inproba possessio et usucapio concessa sit, illa ratio est, quod uoluerunt ueteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa obseruatio fuit, *et ut* creditores haberent a quo suum consequerentur.

§ 55. The motive for permitting at all so unscrupulous an acquisition was the wish of the ancient lawyers to accelerate the acceptance of inheritances, and thus provide persons to perform the sacred rites, to which in those days the highest importance was attached, and also to secure some one from whom creditors might obtain satisfaction of their claims.

§ 56. Haec autem species possessionis et usucapionis etiam lucratiua uocatur; nam sciens quisque rem alienam lucri facit.

§ 56. This mode of acquisition is sometimes called lucrative usucapion, for the possessor knowingly acquires the benefit of another's property.

§ 57. Sed hoc tempore *i*am non est lucratiua. nam ex auctoritate Hadriani senatusconsultum factum est ut tales usucapiones reuocarentur. et ideo potest heres ab eo qui rem usucepit hereditatem petendo *pro*inde eam rem consequi, atque si usucapta non esse*t*.

§ 57. In the present day, however, this kind of usucapion is not lucrative, for the Senate on the motion of Hadrian decreed that such usucapions are revocable, and accordingly where a person thus acquired a thing by usucapion, the heir can sue him by hereditatis petitio and recover the thing just as if the usucapion had never been completed.

§ 58. Necessario tamen herede extante nihil ipso iure pro herede usucapi potest.

§ 58. The existence of a necessary heir excludes ipso jure the operation of this kind of usucapion.

§ 59. Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. nam qui rem alicui fiduciae causa mancipio dederit uel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, ⟨*etiam*⟩ soli si sit. quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus recipimus per usucapionem.

§ 60. Se*d* fiducia contrahitur aut cum creditore pignoris iure, aut cum amico, qu*o* tutius nostrae res apud eu*m sint*; *et* siquidem cum amico contracta sit fiducia, sane omni modo conpetit ususreceptio; si uero cum creditore, soluta quidem pecunia omni modo conpetit, nondum uero soluta ita demum conpetit, si neque conduxerit eam rem a creditore debitor, neque precario rogauerit, ut eam rem possidere liceret; quo casu lucratiua ususcapio conpetit.

§ 61. Item si rem obligatam sibi populus uendiderit eamque dominus possederit, concessa est ususreceptio; sed hoc casu praedium biennio usurecipitur. et hoc est quod uulgo dicitur ex praediatura possessionem usurecipi; nam qui mercatur a populo praediator appella*tur*.

§ 59. There are other conditions under which a knowledge of another's ownership is no bar to usucapion. After a fiduciary mancipation or surrender before a magistrate of his property, if the owner himself should become possessed of it, he recovers his ownership even over land in the period of a year, by what is called usureception or a recovery by possession, because a previous ownership is thereby recovered by usucapion.

§ 60. The fiduciary alienee is either a creditor holding the property as a pledge or a friend to whom the property is made over for safe custody: in the latter case the ownership is always capable of usureception: but in that of a creditor, though the owner can always thus re-acquire after payment of the debt, before payment of the debt he can only re-acquire provided he has not obtained the thing of his creditor on hire or got possession of it by request and licence; in this case he re-acquires by a lucrative usucapion.

§ 61. Again, the owner of a thing mortgaged to the people and sold for non-payment of the mortgage debt may re-acquire it by possession, but in this case, if it is land, usucapion is biennial: and this is the meaning of the saying, that after praediatura (a public sale) land is recoverable by (biennial) possession, a purchaser from the people being called praediator.

§§ 40, 41. Roman law originally only recognized one kind of ownership, called emphatically, quiritary ownership. Gradually, however, certain kinds of ownership were recognized which, though they failed to satisfy all the elements of the definition of quiritary dominion, were practically its equivalent, and received from the courts a similar protection. These kinds of ownership might fall

short of quiritary ownership in three respects, (1) either in respect of the persons in whom they resided, (2) or of the objects to which they related, (3) or of the title by which they were acquired.

(1) To be capable of quiritary ownership a man must have one of the elements of Roman citizenship. Jus quiritium, right quiritary, sometimes, indeed, denotes all the elements of civitas Romana, Roman citizenship (1 §§ 28, 35, comm.). Beneficio principali Latinus civitatem Romanam accipit si ab imperatore jus quiritium impetraverit, Ulpian 3, 2. But the only element of citizenship required for quiritary ownership was commercium, and as we have seen that the Latinus possessed commercium without connubium, the Latinus was capable of quiritary dominion. The alien (peregrinus) on the contrary was incapable, except by special privilege: yet he might have ownership, which he acquired by titles of jus gentium, e.g. tradition, occupation, accession, &c., and could maintain by a real action in the court of the praetor peregrinus or praeses provinciae.

(2) Provincial land was not capable of quiritary ownership. Originally, indeed, private ownership appears to have been confined to things capable of being taken by the hand (mancipatae), that is to movables; and lands were only subject to public dominion or were the common property of the gens. Private ownership, however, first invaded a portion of the land, the heredium, or hereditary homestead of the gentilis, and finally became a general institution; and ager publicus, as opposed to ager privatus, almost ceased to exist on Italian soil. But in the provinces subsequently conquered, land continued to the end subject exclusively to public dominion; and thus one of the essential features of feudal tenure, the exclusive vesting of absolute or ultimate dominion over land in the sovereign as overlord, a principle commonly supposed to have been first introduced into Europe by the invading German hordes, had already existed, though in a different form, over by far the greater portion of the Roman world. It is true that the provinces were divided into private possessions and public domains; but private possessions as well as public domains were subject to a vectigal, and the tenants of the one and lessees of the other were equally devoid of absolute ownership. Rights over solum provinciale of a more or less limited kind were however acquirable, though not by titles of jus civile, and recoverable by real action, for which Gaius uses the terms possessio and ususfructus, § 7.

(3) Bonitary ownership was distinct both from an alien's ownership and from rights over provincial land: it may be defined as the property of a Roman citizen in a subject capable of quiritary

ownership, acquired in a way not known to the jus civile, but introduced by the praetor, and protected by his imperium or executive power. We have seen, for instance, that only non-mancipable things were capable of transfer by tradition; suppose, now, that a mancipable thing were conveyed by the owner to a vendee by tradition; the process would not make him quiritary owner; he would be no better than a bona fide possessor, until by the lapse of a year or of two years he acquired quiritary ownership by usucapion. The praetor, however, assisted the less cumbrous mode of alienation by treating the vendee as if he were owner; by giving him, if in possession, the exceptio rei venditae et traditae or plea of sale and delivery against the vendor who sought to recover as quiritary owner, and enabling the vendee, if dispossessed, to recover against the quiritary owner as well as against any third person by utilis vindicatio, called actio Publiciana, in which he would meet the plea of quiritary ownership (exceptio dominii) by the replicatio rei venditae et traditae or by the replicatio doli, a replication which could not be used by a mere bona fide possessor. Bonitary ownership, or ownership established by the praetor, when once invented, was employed by the praetor in other innovations, which he introduced, namely, as we shall see hereafter, in respect of res corporales of an insolvent debtor transferred to a purchaser by universal succession (bonorum venditio), and in respect of his testamentary and intestate succession (bonorum possessio): 3 § 80.

The barbarous term Bonitary (formed from the classical in bonis esse, in bonis habere) has the authority of Theophilus, who speaks of δεσπότης βονιτάριος, 1, 5, 4; he also calls bonitary ownership natural dominion (φυσικὴ δεσποτεία), as opposed to statutory, civil, or quiritary dominion (ἔννομος δεσποτεία).

Actio Publiciana was not only the remedy of the bonitary owner, but was also applicable on the alienation of anything whatever by a non-proprietor to an innocent alienee (bona fide possessor) in case the latter lost possession of it.

Usucapion, as in the case of bonitary ownership, might in the lapse of time have given the bona fide possessor plenary dominion, and, with it, vindication in the event of a loss of possession; but if he lost possession whilst usucapion was still incomplete, he would have had no real action (for, not being owner, he could not vindicate), if the praetor had not allowed him to sue by the actio Publiciana, which treated bona fide possession, that is, usucapion possession, or the inception of usucapion, as if it were plenary dominion in respect of every one, except the rightful owner. The latter, however, could defend himself in this action successfully against a mere bona fide possessor by the exceptio dominii, or bring a vindication against a

bona fide possessor who retained possession, though, as we have seen, the quiritary owner was not allowed to avail himself of these means of protection against a person having a praetorian or bonitary title of ownership.

§§ 52–60. An heres was either voluntarius, empowered to accept or reject the inheritance, or necessarius, heir as matter of course, without any such power of election. A voluntary heir was either an agnate entitled to succeed an intestate, or any heir, not being a suus or necessarius heres of the testator, entitled under a will. A necessary heir was either a slave of the testator manumitted by his will, or a self-successor (suus heres), that is, a descendant under power of the testator or intestate, made independent by his death, § 152. In every case of voluntarius heres, so long as the heir had not entered on the inheritance, any stranger was permitted to seize parts of it and acquire property therein by usucapion. The only title (causa, titulus) required for this acquisition was the overture or delation of the inheritance to heres and vacancy of possession. This possession, which Gaius (§ 52) calls pro herede (see Dig. 5, 3, 9) is more properly called pro possessore. Cf. 4 § 144. 'Possessor, as possessor, is the occupant, who, asked why he possesses, answers, "Because I possess," and does not claim to be heir even mendaciously, and has no title of possession to allege.' But according to early Roman law any person who was allowed by the voluntary heir to remain in possession of the inheritance for a year was considered lawfully entitled to it as heir, bona fides on the part of a possessor being at this time immaterial for the purpose of acquiring by usucapion (Muirhead, Roman Law, § 32). The senatusconsultum of Hadrian, referred to in the text, § 57, did not prevent the usucapion, but made it nugatory by allowing the heir to recover the hereditaments by real action (hereditatis petitio, or the interdict Quorum bonorum, 4 § 144), just as if the usucapion had never been completed.

Though the occupant of the vacant hereditament was called praedo, his possession, being encouraged by the lawgiver, was not unlawful until restitution was claimed, Savigny, § 264. This possession is probably the key to an enigmatical rule in Roman law: ipsum sibi causam possessionis mutare non posse, Dig. 41, 3, 33, 1; causam possessionis neminem sibi mutare posse, Dig. 41, 5, 2, 1. 'No man can change at pleasure his title of possession.' With the intention, it may be, of limiting the operation of possessio pro herede, an anomalous institution of questionable expediency, the rule declares that a person who commences his possession of a thing in the character of a vendee from a non-proprietor, or holds it as lessee, borrower, depositary, shall not be able, on the death of the true proprietor, to accelerate or initiate usucapion by merely pro-

fessing that he ceases to hold in his former character and proceeds to hold as possessor pro herede or pro possessore.

Possessio pro herede was perhaps the germ of the intestate succession of next of kin or cognati, a succession, as we shall see, not originally recognized in Roman law; at least, the family or next of kin of an intestate would generally have the best chance of seizing any movables or immovables that he left; and perhaps it was this equitable result, no less than the object mentioned by Gaius, § 55, that, in the absence of a regular succession of cognati, led the public to look on possessio pro possessore as a rational and salutary institution.

The senatusconsultum mentioned in the text, § 57, is supposed by some commentators to be the same as one mentioned in the Digest (5, 3, 6), as having been passed at the instance of the Emperor Hadrian, when Q. Julius Balbus and P. Juventius Celsus were consuls, A. D. 129—hence called Sc. Juventianum. The institution of usucapio pro herede and pro possessore, or rather the senatusconsultum by which it was defeated, has left its traces in the formula, still to be found in the Digest, of the interdict Quorum bonorum, a remedy whereby a person who claimed either as civil heir (heres), or as praetorian heir (bonorum possessor), established his claim to succeed and recovered possession of the things belonging to the inheritance. See 4 § 144. To leave these traces in the wording of the interdict was according to Vangerow no oversight on the part of Justinian, as although in his legislation the last remnants of the institution of usucapio pro possessore, that is by a mala fide possessor, had been definitely abolished; yet usucapio pro herede, that is, by a bona fide possessor, or one who sincerely though mistakenly held himself to be heir, was still recognized by jurisprudence, § 320.

§ 60. For fiducia cum creditore see 1 § 114, comm., 3 §§ 90, 91, comm. Mancipation to a friend on trust for safe custody must have been the earliest legal form of deposit, as mancipation to a creditor on trust to reconvey was the earliest mode of pledge or mortgage. For precarium see 4 §§ 138–170, comm.

§ 61. The circumstances contemplated seem to be as follows: A proprietor is debtor to the Roman people or state, and his lands are mortgaged as security for the debt. On default of payment, the state exercises the power of sale: if the debtor is not turned out of possession by the purchaser (praediator) in two years he recovers his proprietorship by usureception. It seems that the sale by the people was merely the transfer of the mortgage; so that, if the debtor afterwards satisfied the purchaser, he recovered his land. Kuntze, Excursus des Röm. Rechts, 436.

Provincial lands were not subject to Usucapion; but a possessor for ten years during the presence of the owner in the same province

(inter praesentes), or for twenty years in his absence (inter absentes), if he satisfied the conditions of usucapion, had, according to the provincial edict, the plea called longi temporis praescriptio against any action brought by the owner for recovery, and subsequently was himself allowed to recover the land, as if he were owner of it, so that longi temporis possessio became in later Roman law not simply a limitation of the right of action, but a positive title analogous to usucapion.

Usucapion required something beyond mere possession for a certain period; and something beyond what we hereafter call Interdict possession, 4 §§ 138–170. The conditions of possession which entitled a possessor to appeal for the protection of his possession to the praetor's interdict were merely that he should have de facto control of the property, as if he were owner of it, all question of right or title being immaterial: nor was a mala fide any more than a bona fide possessor excluded from this protection, unless he had obtained possession from the other party to the interdict by means of violence (vi), or clandestinely (clam), or by his permission (precario). But to produce Usucapion (1) the person and thing to be acquired must be capable of quiritary ownership, and (2) it must not have been taken by any one's theft or violence from the former owner, § 49: so that land not being subject to furtum was more easily acquired by usucapion than movable property, § 50; (3) the possession of the usucapient must be based on a justa causa or titulus, a ground of acquiring ownership, such as tradition or bequest; (4) and commenced with bona fides on his part, a condition which appears to have been annexed to the law of the Twelve Tables by the interpretation of the prudentes. Bona fides, in the case of titulus of occupancy, which is an original mode of acquisition, e.g. usucapio pro derelicto, is a mistaken belief that the thing is res nullius, has no proprietor. In the case of derivative acquisition it is the belief that the auctor, or person from whom the thing is derived, is either owner or, if not owner, has a power of disposition as agent, guardian, mortgagee, or otherwise. Vangerow, § 321. The Canon law requires during the whole period of such prescription the bona fides which the Civil law only requires at the inception.

Justinian remodelled the law of Usucapion, combining it with longi temporis possessio. Cf. Inst. 2, 6. For movables he extended the period from one year to three years: for immovables he abolished the distinction between Italian and provincial land, and required ten years' possession if the parties were domiciled in the same province, and twenty years' possession if they were not domiciled in the same province. Further, he introduced a new usucapion (longissimi temporis praescriptio), which was governed by less stringent conditions

than the ordinary usucapion (longi temporis praescriptio). It applied both to movables and immovables, was not vitiated by certain flaws in the subject (res furtiva, vi possessa), and needed no support of any titulus, but only required bona fides in its inception on the part of the possessor, Cod. 7, 39, 8. It was completed in thirty years.

Usucapion, particularly in this its later form, requires to be carefully distinguished from the Limitation of actions (temporalis praescriptio) with which it has been co-ordinated by some civilians under the name of Acquisitive, as opposed to Extinctive, Prescription. We shall see, 4 § 110, that all actions were originally divided into temporales and perpetuae, temporales being such as could only be brought within a certain period (e.g. in the case of praetorian actions, a year) from the time when the right of action accrued, perpetuae such as were subject to no such limitation. Subsequently, however, even the latter were limited, and no action could be brought after thirty years from the nativity of the action or the time when the right of action accrued (actio nata), Inst. 4, 12 pr. In the case of personal actions there is no danger of confusing Usucapion and Limitation. Usucapion implies possession, and in the case of personal actions, or jus in personam, no such thing as possession is conceivable, for possession only relates to res corporales. Usucapion and the Limitation of real actions are more similar, but even here a distinction may be recognized. Limitation is the extinction of a right by neglect of the person entitled, by his omission to enforce his remedy: Usucapion is the acquisition of a right by something positive on the part of the acquirer, his strictly defined possession for a certain time. Even extraordinary acquisitive prescription requires, as we have seen, bona fides in the commencement of possession: no such condition is attached to Limitation or extinctive prescription.

English law originally only recognized acquisitive prescription in the case of easements and profits, e.g. rights of way; for the acquisition of which the Prescription Act, 2 and 3 Will. 4, c. 71, requires possession for a fixed period. Moreover, since the Act for the limitation of real actions, 3 and 4 Will. 4, c. 27, deprives a proprietor of land of his right as well as his remedy if he omit to bring his action to recover it within twenty years after the right accrued (a limit which by the 37 and 38 Vict. c. 57 was reduced to twelve years), the principle of Usucapion (Acquisitive prescription) in corporeal as well as incorporeal hereditaments may be said to be now recognized in English real property law, though not very distinctly.

Besides the civil titles which we have examined, two others are mentioned by Ulpian: Singularum rerum dominia nobis adquiruntur

rem possideat, non tamen ill*i* usucapio procedit, uelut si quis rem furtiuam aut ui possessam possidea*t*; nam furtiuam lex XII tabularum usucapi prohibet, ui possessam lex Iulia et Plautia. Inst. 2, 6, 1.

§ 46. Item prouincialia praedia usucapio*nem* non recipiunt.

§ 47. ⟨*Item olim*⟩ mulieris, quae in agnatorum tutela er*at*, res mancipi usucapi non poterant, praeterquam si ab ipsa tutore ⟨*auctore*⟩ tradita*e* essent; id*que* ita leg*e* XII tabularum *cautum erat.*

§ 48. Item liberos homines et res sacras et religiosas usucapi non posse manifestum est.

§ 49. Quod ergo uulgo dicitur furtiuarum rerum et ui possessarum usucapionem per leg*em* XII tabularum prohibitam esse, non eo pertinet, ut *ne ipse fur quiue* per uim *possi*det usucapere *p*ossit (nam huic ali*a* ratione usucapio non conpetit, quia scilicet mala fide possidet); sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.

Inst. 2, 6, 3.

§ 50. Vnde in rebus mobilibus non facile p*rocedit, ut bonae fidei possessori usucapio con*petat, quia qui alienam rem uendidit et tradidit furtum committit; idemque accidit etiam si ex ali*a* causa tradatur. sed tamen hoc aliquando aliter se habet; nam si heres rem defuncto commodatam aut locatam uel apud eu*m* depositam existimans eam esse hereditariam uendiderit aut donauerit,

faith of the possessor, cannot be acquired by usucapion, things, for instance, which have been stolen or violently possessed, stolen things being declared incapable of usucapion by the law of the Twelve Tables, and things violently possessed by the lex Julia and Plautia.

§ 46. So, too, provincial land and houses are incapable of usucapion.

§ 47. Formerly, when a woman was under her agnate's guardianship, her mancipable things were not subject to usucapion, unless she herself delivered possession of them with her guardian's sanction, and this was an ordinance of the Twelve Tables.

§ 48. Free men, also, and things sacred or religious, are obviously not susceptible of usucapion.

§ 49. The common statement that in things stolen or violently possessed, usucapion is barred by the law of the Twelve Tables, means, not that the thief or violent dispossessor is incapable of acquiring by usucapion, for he is barred by another cause, his want of good faith; but that even a person who purchases in good faith from him is incapable of acquiring by usucapion.

§ 50. Accordingly, in things movable a possessor in good faith cannot easily acquire ownership by usucapion, because he that sells and delivers possession of a thing belonging to another is guilty of theft. However, sometimes this is otherwise, for an heir who believes a thing lent or let to, or deposited with, the deceased to be a portion of the inheritance, and sells it or gives it away, is not guilty of theft: again, the usufructuary of a female slave who

furtum non committit; item si is, ad quem ancillae ususfructus pertinet, partum e*tiam* suum esse credens uendiderit aut donauerit, furtum non committit; *f*urtum enim sine adfectu furandi non committitur. aliis quoque modis accidere potest, ut quis sine uitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur. Inst. 2, 6, 3 and 4.

believes her offspring to be his property and sells it or gives it away, is not guilty of theft; for there can be no theft without unlawful intention: and similarly other circumstances may prevent the taint of theft from attaching to the delivery of a thing belonging to another, and enable the receiver to acquire by usucapion.

§ 51. Fundi quoque alieni potest aliquis *s*ine ui possessionem na*n*cisci, quae uel ex neglegentia domini uacet, uel quia dominus sine successore decesserit uel longo tempore afuerit; *qu*am si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamuis ipse, qui uacantem possessionem nactus est, intellegat alienum esse fun*d*um, *tamen* nihil hoc *bonae fidei* possessori ad usucapionem noce*t*, ⟨*cum*⟩ inpro*b*ata sit eorum se*n*tentia, qui putauerint furt*iuum* fundum fieri posse. Inst. 2, 6, 7.

§ 51. Possession of land belonging to another may be acquired without violence, when vacant by neglect of the owner, or by his death without leaving a successor, or his long absence from the country; and an innocent person to whom the possession is transferred may acquire the property by usucapion; for though the original seizer of the vacant possession knew that the land belongs to another, yet his knowledge is no bar to the usucapion of the innocent alienee, as it is no longer held that theft can be committed of land.

§ 52. Ru*r*sus ex contrario accidit ut qui sciat alienam rem se possidere usucapiat, ueluti si rem hereditariam, cuius possessionem heres nondum nactus est, aliquis pos*se*derit; nam ei concessum ⟨*est usu*⟩capere, si modo ea res est quae recipit usucapionem; quae species possessionis et usucapionis pro herede u*o*catur.

§ 52. On the other hand, knowledge that one is acquiring possession of another person's property (mala fides) does not always prevent usucapion, for any one may seize a portion of an inheritance of which the heir has not yet taken possession and acquire it by usucapion, provided it is susceptible of usucapion, and he is said to acquire by title of quasi heir.

§ 53. Et in tantum haec usucapio concessa est, ut et res quae solo continentur anno usucapiantur.

§ 53. With such facility is this usucapion permitted that even land may be thus acquired in a year.

§ 54. Quare autem *hoc casu etiam* soli rerum annua constituta sit usucapio, illa ratio

§ 54. The reason why even land in these circumstances demands only a year for usucapion is, that

tionis et in iure cessionis et usucapionis ius proprium est ciuium Romanorum.

Inst. 2, 1, 11.

trate, usucapion, for these are titles confined to citizens of Rome.

§ 66. Nec tamen ea tantum, quae traditione nostra fiunt, | naturali nobis ratione adquiruntur, sed etiam—| occupando ideo——erimus, quia antea nullilus essent; qualia sunt omnia quae terra mari caelo capiuntur.

§ 66. Another title of natural reason, besides Tradition, is Occupation, whereby things previously the property of no one become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured.

§ 67. Itaque si *feram* bestiam aut uolucrem aut pis|cem —— captum —— | —— *eo usque* nostrum esse intellegitur, donec nostra custodia coerceatur; cum uero custodiam nostram euaserit et in naturalem *libertatem se rec*eperit, rursus occupantis fit, quia nostrum esse desinit; naturalem autem libertatem recipere uidetur, cum aut oculos nostros euaserit, aut licet *in* conspectu sit nostro, difficilis tamen *eius* persecutio sit. Inst. 2, 1, 12.

§ 67. For wild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power; after breaking from his custody and recovering their natural liberty, they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.

§ 68. In his autem animalibus quae ex consuetudine abire et redire solent, ueluti columbis et apibus, item ceruis qui in siluas ire et redire solent, talem habemus regulam traditam, ut si reuertendi animum habere desierint, etiam nostra esse desinant et fiant occupantium; reuertendi autem animum uidentur desinere habere, cum reuertendi consuetudinem deseruerint.

Inst. 2, 1, 14.

§ 68. In the case of those wild animals, however, which are in the habit of going away and returning, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down, that only the cessation of the intention of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the intention of returning is held to be lost when the habit of returning is discontinued.

§ 69. Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt.

Inst. 2, 1, 17.

§ 69. Capture from an enemy is another title of property by natural law.

§ 70. Sed et id quo*d* per adluuionem nobis adicitur eodem iure nostrum fit; per adluuio-

§ 70. Alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by a

nem autem *id* uidetur adici quod ita paulatim flumen agro nostro *a*dicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur; hoc est quod uulgo dicitur per adluuionem id adici uideri quod ita paulatim adicitur, ut oculos nostros fallat. Inst. 2, 1, 20.

river, so gradual that at a particular moment the amount of accretion cannot be determined; or, to use the common expression, an addition made by alluvion is so gradual as to elude our sight.

§ 71. Itaque si flumen partem aliquam ex tuo praedio resciderit et ad meum praedium pertulerit, haec pars tua manet. Inst. 2, 1, 21.

§ 71. Accordingly a parcel of your land swept away by a river, and carried down to mine, continues your property.

§ 72. At si in medio flumine insula nata sit, haec eorum omnium commun*is* est, qui ab utraque parte fluminis prope ripam praedia possiden*t*; si uero non sit in medio flumine, ad eos pertinet qui ab ea parte quae prox*i*ma est iuxta ripam praedia habent. Inst. 2, 1, 22.

§ 72. An island that rises in the middle of a river is the common property of the proprietors on both banks of the river; if it is not in the middle of the stream, it belongs to the proprietors of the nearer bank.

§ 73. Praeterea id quod in solo nostro ab aliquo aedificatum est, q*uamuis* ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedi*t*. Inst. 2, 1, 30.

§ 73. Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law; for the ownership of a superstructure follows the ownership of the soil.

§ 74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram conplexa fuerit. Inst. 2, 1, 31.

§ 74. The same occurs a fortiori when trees are planted on my land, provided they have struck root.

§ 75. Idem contingit et in *f*rumento, quod in solo nostro ab aliquo satum fuerit. Inst. 2, 1, 32.

§ 75. Similarly, when corn is sown on my land.

§ 76. Sed si ab eo petamus fu*nd*um uel aedificium et inpensas in aedificium uel in seminaria uel in sementem factas ei soluere nolimus, poterit nos per exceptionem doli mali repellere, utique si bonae fidei possessor fuerit. Inst. l. c.

§ 76. But if I bring an action to recover the land or the building, and refuse to compensate the other party for his outlay on the building or the plantation or the cornfield, he will defeat my action by the plea of fraud, at any rate if he was a bona fide possessor.

§ 77. Eadem ratione probatum est quod in chartulis siue membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis siue membranis cedun*t*. itaque si ego eos libr*os* eas*ue* membranas petam nec inpensam scripturae soluam, per exceptionem doli mali summoueri potero. Inst. 2, 1, 33.

§ 77. On the same principle, the writing inscribed on my paper or parchment, even in letters of gold, becomes mine, for the property in the letters is accessory to the paper or parchment; but if I sue for the books or parchment without offering compensation for the writing, my action will be defeated by the plea of fraud.

§ 78. Sed si in tabula mea aliquis pinxerit ueluti *i*maginem, contra probatur; magis enim dicitur tabulam picturae cedere. cuius diuersitatis uix idonea ratio redditur; ce*r*te secundum hanc regulam si me possidente petas imaginem tuam esse, nec soluas pretium tabulae, poteris per exceptionem doli mali summoueri; at si tu possideas, consequens est, ut utilis mihi actio aduersum te dari debe*at*; quo casu nisi soluam inpensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. illud palam est, quod siue tu subripu*eris* tabulam siue alius, conpetit mihi furti actio. Inst. 2, 1, 34.

§ 78. The canvas belonging to me, on which another man has painted, e. g. a portrait, is subject to a different rule, for the ownership of the canvas is held to be accessory to the painting: a difference which scarcely rests on a sufficient reason. By this rule, it is clear that if I am in possession, and you (the painter) claim the portrait without offering to pay the value of the canvas, I may defeat your claim by the plea of fraud. But if you are in possession, the effect is that I am entitled to an equitable action against you, but in this case unless I offer the price of the painting, you defeat me by the plea of fraud, at any rate if you are a bona fide possessor. It is certain, that, if either you or another purloined the canvas, I can bring an action of theft.

§ 79. In aliis quoque speciebus naturalis ratio requiritur. proin*de* si ex uuis ⟨*aut oliuis aut spicis*⟩ meis uinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id uinum aut oleum aut frumentum, an t*u*um. item si ex auro aut ar*g*ento meo uas aliquod feceris, uel ex tabulis meis nauem aut armarium aut subsellium fabricaueris; item si ex lana mea uestimentum feceris, uel si ex uino et melle meo mulsum feceris, siue ex medi-

§ 79. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey

camentis meis emplastrum uel collyrium feceris, ⟨*quaeritur, utrum tuum sit id quod ex meo effeceris,*⟩ an meum. quidam materiam et substantiam spectandam esse putant, id est ut cuius materia sit, illius et res quae facta sit uideatur esse, idque maxime placuit Sabino et Cassio. alii uero *eius* rem esse putant qui fecerit, idque maxime diuersae scholae auctoribus uisum est; sed eum quoque cuius materia et substantia fuerit furti aduersus eum qui subripuerit habere actionem; nec minus aduersus eundem condictionem ei conpetere, quia extinctae res, licet uindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.

Inst. 2, 1, 25.

are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius; according to others the ownership of the product is in the manufacturer, and this was the doctrine favoured by the opposite school; who further held that the owner of the substance or material could maintain an action of theft against the purloiner, and also an action for damages (condictio), because, though the property which is destroyed cannot be vindicated, this is no bar to a condictio or personal action for damages against the thief and against certain other possessors.

QVIBVS ALIENARE LICEAT VEL NON.

§ 62. Accidit aliquando, ut qui dominus sit alienandae rei potestatem non habeat, et qui dominus non sit *ali*enare possit. Inst. 2, 8 pr.

§ 62. It sometimes occurs that an owner has not a power of alienation, and that a person who is not owner has a power of alienation.

§ 63. Nam dotale praedium maritus inuita muliere per legem Iuliam prohibetur alienare, quamuis ipsius *sit* uel mancipatum ei dotis causa uel in iure cessum uel usucaptum. quod quidem ius utrum ad Italica tantum praedia an etiam ad prouincialia pertineat, dubitatur. Inst. l. c.

§ 63. The alienation of dower land by the husband, without the consent of the wife, is prohibited by the lex Julia, although the husband has become owner of the land by its mancipation to him as dower, or by its surrender to him before a magistrate, or by his usucapion of it. Whether this disability is confined to Italian soil, or extends to the provinces, authorities differ.

§ 64. Ex diuerso agnatus furiosi curator rem furio|si alienare potest ex lege XII tabularum; item procurator—|——

§ 64. Contrariwise, an agnate, as a lunatic's curator, is empowered to aliene the lunatic's property by the law of the Twelve Tables;

est; item creditor pignus ex | pactione, quamuis eius ea res non sit. sed hoc forsitan ideo uideatur fieri, quod uoluntate debitoris intellegitur pignus alienari, qui olim pactus est, ut liceret creditori pignus uendere, si pecunia non soluatur.

Inst. 2, 8, 1.

and so is a procurator that of his principal (when invested by his principal with free power of administration: Inst. 2, 1, 43). Again, a pledgee, in pursuance of a pact authorizing him to sell, may aliene the pledge, though he is not owner of the thing; this, however, may be said to rest on the assent of the pledgor previously given in the agreement which empowered the pledgee to sell in default of payment.

§ 65. Tradition or transfer of possession, as we have seen, was a natural mode of transferring ownership in such non-mancipable things as were corporeal: in mancipable things it could only transfer bonitary ownership. The nature of this conveyance, which belongs to jus gentium, has been fully explained above, §§ 14 *a*-27, comm.

Fructus or produce of a thing, when they become distinct entities, belong to the owner of the principal thing, unless specially acquired from him by some one else. They may be so acquired by transfer, in which case one act of assent may suffice as the antecedent to many acts of prehension; for instance, in the gathering (perceptio) of fruits by a usufructuary. Here the taking them occurs from time to time; the will or intention of the owner of the principal thing was manifested once for all when he created the usufruct. But in the case of a hirer of land by mere contract (colonus) a special tradition of the fructus by the owner in each particular case of acquisition is required. Thus if the fructus are res nec mancipi, perception of them, with the consent of the owner, gives him ownership: if they are res mancipi, bona fide possession, which usucapio will ripen into ownership.

Mere severance (separatio) of fruits (fructus) from the soil or parent substance, without any act of appropriation (perceptio), gives to the bona fide possessor, according to Savigny, Besitz, 22 *a*, bona fide possession, which will be transformed into ownership by usucapion: according to Vangerow, § 326, it gives him immediate and plenary ownership. Windscheid, Pandekten, § 186, notes 11 and 12, takes an intermediate position. Cf. Inst. Just. 2, 1, 35.

If the true owner recovers his land or cattle by vindicatio, the judex will compel a bona fide possessor who is defendant to restore the unconsumed fruits (fructus extantes) but not to make compensation for the consumed fruits (fructus consumpti). The mala fide possessor, on the contrary, acquires no property in the consumed fruits, but is compelled either by the vindicatio by which the principal thing is recovered or by a separate personal action (condictio) to

restore their value; he may likewise be compelled to restore the fructus extantes either by the principal vindicatio or by a separate vindicatio. He can be sued for the value of the fruits he has neglected to gather (fructus neglecti) only in the principal vindicatio: their non-existence prevents his being sued for them in a separate vindicatio; and the fact that he is not enriched by them prevents his being sued for them in a separate condictio, Savigny, System, § 267.

§§ 66–69. Occupation gives property in a thing which previously has no owner. Quod enim ante nullius est, id naturali ratione occupanti conceditur, Inst. 2, 1, 12. If a thing had already an owner, it is only after dereliction by him that it can be appropriated by occupation. Dereliction, or renunciation of ownership, requires both the intention to abandon it and an external action. Thus the casting overboard of articles in a tempest to lighten a ship is not dereliction, as there is no intention of abandoning the property in the event of salvage, Inst. 2, 1, 48. Nor does the mere intention of abandonment constitute dereliction of ownership without a throwing away or removal or some other external act; and herein dereliction of ownership differs from dereliction of possession, which does not require this second element. Differentia inter dominium et possessionem haec est, quod dominium nihilo minus ejus manet qui dominus esse non vult, possessio autem recedit ut quisque constituit nolle possidere, Dig. 41, 2, 17. 'There is this difference between ownership and possession, that ownership continues after the will to own has ceased, whereas possession ceases with the cessation of the will to possess.'

§ 68. Among wild animals (ferae naturae) a distinction is to be drawn. In those of them that are half tamed (mansuefactae), among which are mentioned deer, peacocks, pigeons, bees, property is not limited by strict detention, as in other wild animals, but by animus revertendi. A migrating swarm (examen) of bees, accordingly, would only continue to belong to the owner of the hive as long as it continues in his sight and is easy to recapture, as it has no intention of returning. In tame animals, e.g. dogs or geese, the rights of the owner are not extinguished by their straying without an intention to return. Inst. 2, 1, 12–16.

§§ 76–79. The intimate conjunction of two things, so that they are no longer separable and restorable to their former condition, may produce a transmutation of ownership. A separable junction, as when two flocks of sheep are intermingled, or when a stone is set in a ring, or when two metals are soldered together (plumbatura), or when the grain of one man is mixed with that of another, apart from an agreement to share in common, produces no change of ownership. In one case, however, namely, when material has been used in building a house on another man's land, although the pro-

perty of the owner of the material continues, it is in a dormant state since he cannot, so long as it is fixed to the land, vindicate it, 'quia superficies solo cedit,' § 73. The Twelve Tables, however, allowed him the actio de tigno juncto to recover double the value.

An inseparable union sometimes produces co-ownership in the whole (communio), sometimes the exclusive ownership of one of the parties (accessio).

When two things belonging to different owners are mixed but neither produce a new species, nor the relation of principal and accessory, e. g. when two similar wines or metals are mixed; or when a new species is produced with the consent of both owners, as when mead is produced by mixing honey and wine, electrum by mixing gold and silver; then each owner loses his separate ownership of a part, and becomes joint owner of the whole. Inst. 2, 1, 27.

When a new species is produced by one owner without the consent of the other, then, according to the law as settled by Justinian, the exclusive ownership is vested in the producer, and the other can only obtain redress by actio in personam for the loss of his ownership.

Further, when the mixture establishes the relation of principal and accessory, that is, when one thing loses its independent existence and becomes a part of the other (accessio), then the ownership in the whole is vested in the owner of the dominant part, accessorium sequitur principale; cf. Dig. 6, 1, 23 Si quis rei suae alienam rem ita adjecerit, ut pars ejus fieret, veluti si quis statuae suae bracchium . . . adjecerit, dominum ejus totius rei effici . . . plerique recte dicunt. It will sometimes be a question which part is to be regarded as principal and which as accessory, and the solution does not depend on their comparative value. The Roman jurists themselves differ sometimes, as is shown in the text, in their application of the principle of accession, but the principle itself seems to be that the part which maintains its previous identity and gives the dominating character to the entire thing is principal, while the part which is merged in the other and so ceases to have an independent existence, is accessory, as e. g. trees of one person planted and taking root in the land of another, are thereby entirely incorporated in the land. So again, a fresco painted by one person on a wall belonging to another is evidently something accessory to the wall. The case of an independent picture is a subject of dispute in this relation. Gaius, § 78, appears to think that it ought to be governed by the analogy of a manuscript, where the property in the writing follows the property in the paper, § 77. It may be said, however, that the principle of accession does not properly apply to a picture or to a manuscript of literary value, since they are new creations, differing in character from the materials in which they

are embodied. It was indeed finally settled by Justinian that the property in the picture belonged to the painter, though the latter would be bound, as in similar cases, to make good the loss suffered by the previous owner of the canvas. Inst, 2, 1, 34, cf. Sohm, § 64 n.

The remedy of the ex-proprietor of the accessory is utilis actio, § 78. This appears to be a real action (utilis in rem actio), which, as a real action implies that the plaintiff is owner, seems to mean a Fictitious action, 4 § 34, i. e. one whose formula feigns that the property was never divested by Accession. This may be what Gaius means by utilis actio.

§ 79. Specification or conversion by labour of something so as to constitute a new thing is a title which cannot without violence be brought under either Occupatio or Accessio. Here one person contributes only his labour, whereby he transforms the material or materials belonging to another into a new product (nova species). The Sabinians held that the product belonged (by Accessio?) to the owner of the material, the Proculians (by Occupatio?) to the producer of the specification or conversion. Justinian adopts an intermediate opinion, which Gaius mentions, Dig. 41, 1, 7, 7, cf. Inst. 2, 1, 25, that the product belongs to the producer, provided that it cannot be reduced to its original substance, while if it can be it belongs to the owner of that substance; e. g. a gold or silver vessel belongs to the owner of the gold or silver out of which it was made: and provided further that the change is a genuine fabrication or manufacture; for instance, the mere thrashing out of corn is not sufficient to change the ownership, and therefore the corn belongs to the owner of the sheaves, cf. § 79: and the mere dyeing of wool operates no transfer of ownership to the dyer, Dig. 41, 1, 26, 3.

In the subjoined synopsis of the various titles to ownership which have been considered the proper position of Specification is open to controversy, but it would seem that it should be regarded as a distinct and original mode of acquisition.

Acquisition is either Derivative, that is derived by Succession from some one else, or Original, arising independently of any one else.

Derivative acquisition depends on (1) the will of the previous owner (alienatio, testatio), (2) the disposition of a magistrate or judex (adjudication, addiction, execution), or (3) a direct disposition of law (intestate succession, caducity, forfeiture).

Original acquisition is either independent of Possession or depends on Possession.

Original acquisition independent of Possession is either the effect of Separation or of Conjunction.

Separation is a title to property in the case of Separatio

fructuum, which confers property in the fruits on the owner of the principal thing, or on the bona fide possessor of it, or on the emphyteuta.

Conjunction is either the conjunction of equal with equal or the conjunction of accessory with principal.

The conjunction of equal with equal is seen in Confusio, which produces communio or co-proprietorship.

The conjunction of accessory with principal is either of immovable with immovable, instanced in Alluvio:

or of movable with immovable, instanced in Satio, Plantatio, Inaedificatio:

or of movable with movable, instanced in Scriptura, Pictura.

Original acquisition dependent on Possession is either further dependent on Time or is not dependent on Time.

Original acquisition dependent on Possession and further dependent on Time is seen in Usucapio and Praescriptio longi temporis, when this latter became an acquisitive and not simply an extinctive title.

Original acquisition dependent on Possession but independent of Time is seen in Occupatio, or taking possession of a res nullius, including Captio ferarum, Captio hostilis, Inventio derelicti, Inventio thesauri.

§§ 62–64. It is conjectured that by some accidental displacement these three paragraphs have been transposed, and that in their proper order they should follow § 61. There seems no good reason why they should be interposed between the titles of civil law and the titles of natural law.

The lex Julia, relating only to Italian soil, permitted the husband to aliene the dotal land, with the consent of the wife, but prohibited its hypothecation, even with her consent. Justinian extended the prohibition to provincial soil, and to alienation with the wife's consent, Inst. 2, 8, pr.

In the time of the jurist Javolenus, who flourished under Trajan and Hadrian, and still probably in that of Gaius, the power of sale of a pledge, § 64, was what is known in later jurisprudence as accidentale negotii, requiring a special agreement, Dig. 47, 2, 73, where by an omission of the compilers the law is not brought up to date. But in later law, as early at least as the time of Ulpian it had become a necessary consequence of the transaction—essentiale negotii—so that a contrary agreement is inoperative, except that it imposes a necessity of three denunciations or demands of payment, Dig. 13, 7, 4.

DE PVPILLIS AN ALIQVID A SE ALIENARE POSSVNT.

§ 80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem mancipi alienare posse; nec mancipi uero feminam quidem posse, pupillum non posse.
Inst. 2, 8, 2.

§ 81. Ideoque si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet *p*ecunia res nec mancipi sit, contrahit obligationem.
Inst. l. c.

§ 82. *At* si pupillus idem fecerit, | quia non *facit acci*-*pien*tis s——, null*am* | cont*ra*hit obligationem; unde pupillus uindicare qu*id*em nummos suos potest, sicubi extent, id | est e*os* *p*etere *su*os *ex* iure Quiritium *esse*——|—— repetere potest s——|tere. *un*de de pupillo quidem quaeritur, an num—|—qu*os* mutuos dedit, ab eo qui acc*e*pit, ——|—— actione eos persequi possit, quoniam—|——potest.
Inst. l. c.

§ 83. *At* ex contrario | *omnes res tam mancipi quam* nec mancipi mulier*ibus* et pupilli*s* sin*e* tutoris auctoritate solui possunt, quoniam meliorem condicionem suam facere eis etiam sine tutoris auctoritate concessum est.

§ 84. Itaque si debitor pecuniam pupillo soluat, facit quidem pecuniam pupilli, sed ipse non liberatur, quia nullam obligationem pupillus sine tutoris auctoritate dissoluere potest, quia nullius rei alienatio ei sine

WHETHER WARDS CAN ALIENE.

§ 80. We must next observe, that neither a woman nor a ward (pupillus) can aliene a mancipable thing without their guardian's sanction: nor can a ward even aliene a non-mancipable thing without such sanction, though a woman can.

§ 81. Thus a woman lending money without the guardian's sanction passes the property therein to the borrower, money being a non-mancipable thing, and so imposes a contractual obligation on the borrower.

§ 82. But a ward lending money without his guardian's sanction does not pass the property, and so does not impose a contractual obligation on the borrower, he can therefore recover back the money, if it exists, by vindication, that is, by claiming it as quiritary owner; whereas a woman can only bring a personal action of debt. Whether a ward can maintain an action against the borrower in case the money has been spent by him, is a subject of controversy, for a ward can acquire a right of action against a person without the sanction of his guardian.

§ 83. On the contrary, both mancipable and non-mancipable things can be conveyed to women and to wards without their guardian's sanction, because they do not require his sanction to better their position.

§ 84. Accordingly, a debtor who pays money to a ward passes the property therein to the ward, but is not discharged of his obligation, because a ward cannot release a debtor from any liability without his guardian's sanction, as

tutoris auctoritate concessa est; sed tamen si ex ea pecunia locupletior factus sit et adhuc petat, per exceptionem doli mali summoueri potest. Inst. l. c.

without such sanction he cannot part with any right: if, however, he is profiting by the money, and yet demands further payment, he may be barred by the plea of fraud.

§ 85. Mulieri uero etiam sine tutoris auctoritate recte solui potest; nam qui soluit, liberatur obligatione, quia res nec mancipi, ut proxime diximus, a se dimittere mulieres etiam sine tutoris auctoritate possunt. quamquam hoc ita est, si accipiat pecuniam; at si non accipiat, sed habere se dicat et per acceptilationem uelit debitorem sine tutoris auctoritate liberare, non potest. Inst. l. c.

§ 85. A woman may be lawfully paid without her guardian's sanction, and the payer is discharged of liability, because, as we have just mentioned, a woman does not need her guardian's sanction for the alienation of a non-mancipable thing, provided always that she receives actual payment: for if she is not actually paid, she cannot formally release her debtor by acceptilation (3 § 169) unless with her guardian's sanction.

§ 80, cf. 1, §§ 142–154, comm., 189–193.

§§ 81, 82. For mutuum, see 3 § 90. If the money delivered by a ward could be traced it was recoverable from *any one* by real action (vindicatio): if it had been consumed in bona fides a personal action, condictio certi, would probably lie against the borrower to recover an equivalent sum: if it had been consumed in mala fides a personal action, ad exhibendum, would lie to recover an equivalent sum and damages, Inst. 2, 8, 2.

§ 85. The pupilage of women after attaining the age of twelve, i.e. the age of puberty, had become obsolete before the time of Justinian, and with it their incapacities of alienation.

§ 86. Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipioue habemus; item per eos seruos in quibus usu*mfructum* habemus; item per homines liberos et seruos alienos quos bona fide possidemus. de quibus singulis diligenter despiciamus. Inst. 2, 9 pr.

§ 86. We may acquire property not only by our own acts but also by the acts of persons in our power, hand, or mancipium; further, by slaves in whom we have a usufruct; further, by freemen or another's slave of whom we are bona fide possessors; let us now examine these cases in detail.

§ 87. Igitur ⟨*quod*⟩ liberi nostri quos in potestate habemus, item quod serui *nostri* mancipio accipiunt uel ex tra-

§ 87. The rights of property which children under power or slaves acquire by mancipation or tradition, or claims they acquire

ditione nanciscuntur, siue quid stipulentur, uel ex aliqualibet causa adquirunt, id nobis adquiritur; ipse enim qui in potestate nostra est nihil suum habere potest. et ideo si heres institutus sit, nisi nostro iussu hereditatem adire non potest; et si iubentibus nobis adierit, hereditas nobis adquiritur proinde atque si nos ipsi heredes instituti essemus; et conuenienter scilicet legatum per eos nobis adquiritur. Inst. 2, 9, 3.

by stipulation, or by any other title, are acquired for their superior; for a person subject to power is incapable of holding property, accordingly if instituted heir he must have the command of his superior to be capable of accepting the inheritance, and if he has the command of the superior and accepts the inheritance, it is acquired for the superior just as if the latter had himself been instituted heir: and the rule that it is the superior who acquires applies equally in the case of a legacy.

§ 88. Dum tamen sciamus, si alterius in bonis sit seruus, alterius ex iure Quiritium, ex omnibus causis ei soli per eum adquiri cuius in bonis est.

§ 88. But it is to be noticed that when one man is bonitary owner of a slave and another quiritary owner, whatever the mode of acquisition, it enures exclusively to the bonitary owner.

§ 89. Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis, sed etiam possessio; cuius enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eos usucapio procedit. Inst. l. c.

§ 89. Not only ownership is acquired for the superior but also possession, for the possession of the inferior is deemed to be the possession of the superior, and thus the former is to the latter an instrument of acquiring by usucapion.

§ 90. Per eas uero personas quas in manu mancipioue habemus proprietas quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt; an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus.

§ 90. Persons in the hand or mancipation of a superior acquire ownership for him by all modes of acquisition just as children or slaves in his power; whether they acquire possession for him is a controversy, as they are not themselves in his possession.

§ 91. De his autem seruis in quibus tantum usumfructum habemus ita placuit, ut quidquid ex re nostra uel ex operis suis adquirant, id nobis adquiratur; quod uero extra eas causas, id ad dominum proprietatis pertineat. itaque si iste seruus heres institutus sit legatumue quod ei datum fue-

§ 91. Respecting slaves in whom a person has only a usufruct, the rule is, that what they acquire by means of the property of the usufructuary or by their own labour is acquired for the usufructuary; but what they acquire by any other means belongs to their proprietor. Accordingly, if such a slave is instituted heir or made legatee, the inheritance or

rit, non mihi sed domino proprietatis adquiritur.

Inst. 2, 9, 4.

legacy is acquired, not for the usufructuary, but for the owner.

§ 92. Idem placet de eo qui a nobis bona fide possidetur, siue liber sit siue alienus seruus. quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore. itaque quod extra duas istas causas adquiritur, id uel ad ipsum pertinet, si liber est, uel ad dominum, si seruus est.

Inst. l. c.

§ 92. The possessor in good faith of a freeman or a slave belonging to another is held to have the same rights as a usufructuary; what they acquire on any other account than the two we mentioned, belonging in the one case to the freeman himself in the other to the rightful owner.

§ 93. Sed bonae fidei possessor cum usuceperit seruum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest. usufructuarius uero usucapere non potest: primum quia non possidet, sed habet ius utendi [et] fruendi; deinde quia scit alienum seruum esse.

Inst. l. c.

§ 93. But after a possessor in good faith has acquired the ownership of a slave by usucapion, since he has thus become owner of him, all acquisitions by the slave enure to his benefit. A usufructuary cannot acquire a slave by usucapion, for, in the first place, he has not possession, but only a right of usufruct; and in the second place, he knows that the slave belongs to some one else.

§ 94. De illo quaeritur, an per eum seruum in quo usumfructum habemus possidere aliquam rem et usucapere possimus, quia ipsum non possidemus. per eum uero quem bona fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utriusque persona secundum definitionem quam proxime exposuimus, id est si quid ex re nostra uel ex operis suis adquirant [id nobis adquiritur].

Inst. l. c.

§ 94. It is a question whether a slave can be an instrument of possession and usucapion for a usufructuary, the slave not being himself in his possession. A slave, undoubtedly, can be the instrument of possession and usucapion for a bona fide possessor. Both cases are subject to the limitation made above as to things acquired by the slave by means of the usufructuary's property or by his own labour.

§ 95. Ex his apparet per liberos homines quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos seruos, in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse. et

§ 95. It appears that freemen not subject to my power nor in my bona fide possession, and slaves of other people of whom I am neither usufructuary nor lawful possessor, cannot under any circumstances be instruments of acquiring for me, and this is

hoc est quod uulgo dicitur per extraneam personam nobis adquiri non posse. tantum de possessione quaeritur, an ⟨*per extraneam*⟩ pers*onam* nobis adquiratur. Inst. 2, 9, 5.

§ 96. In summa sciendum est his qui in potestate manu mancipioue sunt nihil in iure cedi posse; cum enim *i*starum personarum nihil suum esse possit, conuenie*ns* est scilicet, ut nihil suum ess*e* in iure uindicare possint.

the import of the dictum that a stranger to the family cannot be an instrument in the acquisition of anything; only in respect of possession there is a controversy as to whether it cannot be acquired through a stranger.

§ 96. Finally, it is to be observed that persons under power, in hand, or in mancipium, cannot acquire by surrender before a magistrate, for, as nothing can belong to such persons, it follows that they cannot vindicate anything as their own before a magistrate.

§ 87. Manus and mancipium had ceased to exist before the time of Justinian, and patria potestas was much reduced. The gradual steps by which filiusfamilias acquired an independent proprietary position have been already described, 1 § 55, comm. The reduction of patria potestas, and the abolition of the dependent law of Agnation, may be almost regarded (so fundamental were these institutions in jus civile) as the abrogation of the jus civile, and the substitution in its stead of what the Romans called jus gentium.

§ 88. The power of acquiring by the acts of a slave and the power of manumission, so as to make a slave Latinus, accompany Bonitary, not Quiritary, ownership, where these are separated, 1 §§ 35, 54, 3 § 166.

§ 90. It is to be noticed, as Professor Muirhead points out in his note to this passage, that no reason is given for making a distinction between persons in manu mancipiove and filiifamilias and slaves in respect of the acquiring possession for their superior.

§ 94. Dig. 41, 2, 1, 8 Per eum, in quo usumfructum habemus, possidere possumus, sicut ex operis suis adquirere nobis solet, nec ad rem pertinet, quod ipsum non possidemus: nam nec filium.

§ 95. All Dispositions or modes of conferring either rights against one (jus in personam), or rights against the world (jus in rem), are divisible, as we have before mentioned, into two parcels; an essential portion, some mental or internal act, the Intention of the parties; and an evidentiary portion, the Execution of this intention, its incorporation in some overt act. Can these elements of title be contributed by different persons? Can the Intention of disposing, that is, of acquiring or aliening, reside in one, and can its Execution, its external manifestation, be delegated to a representative?

Originally, that is, under the ancient civil law, representation was

only admitted when the representative was in an inferior status to the principal, was his slave, or subject to his potestas, manus, or mancipium, § 95. This limitation was found to be inconvenient, when, in the progress of Roman conquest, Roman citizens became proprietors in remote parts of the world; and Possession was allowed to be acquirable by the instrumentality of extranea persona, that is, of a person who stood in no relation of inferiority to the acquirer, which though a doubtful point in the time of Gaius, was finally settled by a constitution of the Emperor Severus. In a civil solemnity, like mancipation, a man could not be represented by an independent agent; but when the transfer of possession (traditio) became a mode and ultimately the universal mode of transferring dominion, it followed that Ownership (dominium), as well as Possession, could be acquired by the agency of libera persona, if the person making traditio of a thing to the agent was himself owner of it, Inst. 2, 5.

The acquisition of Obligations or personal rights by brokerage of an independent agent was less perfectly developed. In fact Roman law adhered throughout its history to the rule that an agent could only contract rights for himself and not for his principal, though means were taken to circumvent this restriction as far as possible. The process employed for this purpose was a duplication of the relation of agency (mandatum). A as principal (dominus) appointed B his agent (procurator). B then contracted with a third party in his own name, and, in order to transfer the benefit of his contract to A, he ceded to him his right of action, that is to say, B, as principal, in his turn made A his agent (procurator in rem suam), whereby A was able to sue in the name of B, and obtain judgement on his own account. Finally, the praetor allowed the principal to sue immediately, without an express mandate, if intention to assign was shown, by bringing a utilis actio, 3 § 163, comm.

§ 96. We might have expected that, as those subject to potestas can acquire for their superiors by Mancipatio, § 87, so they could also acquire by In jure cessio, especially as the same form of words—Hunc ego hominem ex jure Quiritium meum esse aio—was used in Mancipatio, 1 § 119, and in Vindicatio, 4 § 16. It seems, however, that in Mancipatio the formula could be changed to Hanc rem ex jure Quiritium Lucii Titii domini mei esse aio, 3 § 167; and that a similar modification was not admissible in in jure cessio. It follows that an inferior (filius, qui in mancipio est, or servus) could acquire for his superior rural servitudes, but not urban or personal servitudes, §§ 29, 30, these being only created by in jure cessio; not, that is to say, as res singulae: for as parts of a rerum universitas these and all other rights could be acquired for a superior by an inferior by making aditio of an hereditas with the sanction of the superior, § 188; and

even as res singulae these rights could be acquired for a superior by an inferior by title of legatum; that is, if they are conferred by a testator on the inferior as legatarius, Vat. frag. 51.

As Hereditas includes Obligations (res incorporales), active and passive, as well as Dominium (res corporalis), the consideration of Obligation should, theoretically speaking, precede the consideration of Inheritance; in an elementary exposition like the present, however, no practical inconvenience is occasioned by postponing the consideration of Obligations, while we gain by exhausting the subject of jus in rem before proceeding to the examination of jus in personam.

We may remember that Hereditas, as well as Servitudes and Obligations, was included by the Romans under the term Res incorporales, § 14. The whole division of rights, however, into Res corporales and Res incorporales is unsatisfactory; for, as we have already noticed, it was only from confusion of thought that Dominium was held to be Res corporalis; for all Rights are, really, Res incorporales.

QVIBVS MODIS PER VNIVERSITATEM RES ADQVIRANTVR.

§ 97. *Hactenus* tantisper admonuisse sufficit quemadmodum singulae res nobis adquirantur. nam legatorum ius quo et ipso singulas res adquirimus opportunius alio loco referemus. uideamus itaque nunc quibus modis per uniuersitatem res nobis adquira*n*tur. Inst. 2, 9, 6.

§ 97. So much at present respecting the modes of acquiring SINGLE rights; for bequest by way of legacy, another title whereby single rights are acquired, will find a more suitable place in a later portion of our treatise. We proceed to the titles whereby an AGGREGATE of rights is acquired.

§ 98. Si cui heredes facti sumus, siue cuius bon*orum possessionem* petierimus, siue cuius bona emerimus, siue quem adoptauerimus, siue qu*a*m in manum ut uxorem receperimus, eius res ad nos transeunt. Inst. l. c.

§ 98. If we become civil heirs of anyone, or claim praetorian succession to his property, or purchase the estate of an insolvent, or adopt a person sui juris, or receive a wife into our hand, the whole property of those persons is transferred to us in an aggregate mass.

§ 99. Ac pr*i*us de heredita*t*ibus dispiciamus quarum duplex condicio est: n*am* uel ex testamento uel ab intestato ad nos pertine*nt*. Inst. l. c.

§ 99. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate.

§ 100. Et prius est, ut de his dispiciamus quae nobis ex testamento obueniunt. Inst. l. c.

§ 100. And we first treat of acquisition by will.

§ 101. Testamentorum autem genera initio duo fuerunt: nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est cum belli causa arma sumebant; procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et in otio faciebant, alterum in proelium exituri. Inst. 2, 10, 1.

§ 101. Wills were originally of two kinds, being made either at the comitia calata, which were held twice a year for making wills, or in martial array, that is to say, in the field before the enemy, martial array denoting an army equipped and armed for battle. One kind, then, was used in time of peace and quiet, the other by persons about to go to battle.

§ 102. Accessit deinde tertium genus testamenti quod per aes et libram agitur. qui neque calatis comitiis neque in procinctu testamentum fecerat, is si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dar*i* uelle*t*. qu*od* testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur. Inst. l. c.

§ 102. More recently, a third kind was introduced, effected by bronze and balance. A man who had not made his will, either in the comitia calata or in martial array, being in apprehension of approaching death, used to convey his estate by mancipation to a friend, whom he requested to distribute it to certain persons in a certain manner after his death. This mode of testamentary disposition is called the will by bronze and balance, because it is carried out by the process of mancipation.

§ 103. Sed ill*a* quidem duo genera testamentorum in desuetudinem abierunt; hoc uero solum quod per aes et libram fit in usu retentum est. sane nunc al*it*er ordinatur quam olim solebat. namqu*e* olim familiae emptor, id est qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator quid cuique post mortem suam dari uellet; nunc uero alius heres testamento instituitur, a quo etiam legat*a* reli*n*qu*u*ntur, alius dicis gratia propter ueteris iuris imitationem familiae emptor adhibetur. Inst. l. c.

§ 103. The first two modes have fallen into desuetude, and that by bronze and balance, which alone survives, has undergone a transformation. In former times the vendee of the estate, the alienee by mancipation from the testator, held the place of heir, and received the testator's instructions respecting the disposition of his property after his death. At the present day, the person who is instituted heir, and who is charged with the bequests, is different from the person who, for form's sake, and in imitation of the ancient law, represents the purchaser.

§ 104. Eaque res ita agitur: qui facit ⟨*testamentum*⟩, adhi-

§ 104. The proceedings are as follows: The testator having sum-

bitis, sicut in ceteris mancipationibus, v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam; in qua re his uerbis familiae emptor utitur FAMILIA PECVNIAQVE TVA ENDO MANDATELAM CVSTODELAMQVE MEAM, QVO TV IVRE TESTAMENTVM FACERE POSSIS SECVNDVM LEGEM PVBLICAM, HOC AERE, et ut quidam adiciunt AENEAQVE LIBRA ESTO MIHI EMPTA; deinde aere percutit libram, idque aes dat testatori uelut pretii loco; deinde testator tabulas testamenti tenens ita dicit HAEC ITA VT IN HIS TABVLIS CERISQVE SCRIPTA SVNT, ITA DO ITA LEGO ITA TESTOR ITAQVE VOS QVIRITES TESTIMONIVM MIHI PERHIBETOTE; et hoc dicitur nuncupatio: nuncupare est enim palam nominare, et sane quae testator specialiter in tabulis testamenti scripserit, ea uidetur generali sermone nominare atque confirmare.

moned, as is done in other mancipations, five witnesses, all Roman citizens of the age of puberty, and a holder of the balance, and having already reduced his will to writing, makes a pro-formâ mancipation of his estate to a certain vendee, who thereupon utters these words: 'Thy family and thy money into my charge, ward, and custody I receive, and, in order to validate thy will conformably to the public enactment (the Twelve Tables), with this ingot, and'—as some continue—'with this scale of bronze, unto me be it purchased.' Then with the ingot he strikes the scale, and delivers the ingot to the testator, as by way of purchase-money. Thereupon the testator, holding the tablets of his will, says as follows: 'This estate, as in these tablets and in this wax is written, I so grant, so bequeath, so declare; and do you, Quirites, so give me your attestation.' These words are called the nuncupation, for nuncupation signifies public declaration, and by these general words the specific written dispositions of the testator are published and confirmed.

§ 105. In testibus autem non debet is esse qui in potestate *est* aut familiae emptoris aut ipsius testatoris, quia propter ueteris iuris imitationem totum hoc negotium quod agitur testamenti or*di*nandi gratia creditur inter familiae emptorem agi et testatorem; quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat heredis loco erat; itaque reprobatum est in ea re domesticum testimonium. Inst. 2, 10, 9.

§ 105. For the part of witness, it is a disqualification to be in the power of the purchaser of the estate or of the testator, because, the old proceeding furnishing the model, the whole testamentary process is supposed to be a transaction between the purchaser and the testator; and in old times, as was just observed, the purchaser was in the place of the heir; wherefore the testimony of persons in the same family was rejected.

§ 106. Unde et si is qui in potestate patris est familiae emptor adhibitus sit, pater eius

§ 106. Hence too, if the vendee is a filiusfamilias, neither his father nor any one in his father's

testis esse non potest; ac ne is quidem qui *in* eadem potestate est, uelut frater eius. sed si filius familias ex castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur nec is qui in potestate patris *est*.

§ 107. De libripende eadem quae et de testibus dicta esse intellegemus; nam et is testium numero est.

§ 108. Is uero qui in potestate heredis aut *l*egatarii est, cuiusue heres ipse aut legatarius in potestat*e* est, quique in eiusdem potestate est, a*de*o testis et libripens adhiberi potest, ut ipse quoque heres *a*ut legatarius iure adhibeantur. sed tamen quod ad heredem pertinet quique in eius potestate est cuiusue *is* in potestate erit, minime hoc iure uti debemus.

power, his brother, for instance, is competent to attest; on the other hand if a filiusfamilias, after his discharge from service, make a will of his military peculium, neither his father nor any one in his father's power is qualified to be a witness.

§ 107. The same rules apply to the balance-holder, for the balance-holder is reckoned as a witness.

§ 108. Not only is a person who is in the power of the heir or legatee, or a person who has power over the heir or legatee, or a person in the same power as the heir or legatee, capable of being witness or balance-holder, but the heir or legatee himself can act in this character. However, it is advisable that as regards the heir, and those in his power, and the person in whose power he is, the testator should not avail himself of this right.

§§ 97, 98. On the death of a civis all his rights and obligations (except those of a purely personal character, such as ususfructus and liability for delict) were regarded as constituting a universitas juris or undivided succession (supra, p. 126) called hereditas. The hereditas, in fact, was the legal personality of the deceased, and so the successor to it, called heres, had exactly the same position in respect of the entire family property as the deceased paterfamilias. Hence he was personally liable to pay all the debts in full, as if he had himself contracted them, cf. Sohm, § 108.

In the corresponding passage of Justinian's Institutes bonorum emptio and conventio in manum, being obsolete, are not mentioned.

§§ 101–103. A will is thus defined by Ulpian: Testamentum est mentis nostrae justa contestatio, in id sollemniter facta ut post mortem nostram valeat, 20, 1. Testamentary disposition was an interference with the rights of family succession under the law of intestacy, which at first seemed so great an innovation as to require the sanction of the gentes. Accordingly the will executed in the Comitia Calata, or convocation of the gentes, was really a private law (perhaps originally instituted as a modified form of adoption, when a man had no children to succeed to his property); and even the will in procinctu, when we remember the original identity at

Rome of the civil and military organization, may be regarded as the legislative act of the curiae in military convocation. The essential characteristic of this will was the nomination of a heres. Hence so important became the institution of a heres to the validity of a will in Roman law, that a Roman testament might be simply defined as the institution of a heres.

The mancipatory will, or will by bronze and scale, probably began to supersede the older form, which was perhaps confined to patricians, when the Twelve Tables gave legal force to the nuncupative part of mancipation (Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto, Festus. 'In contract or conveyance by bronze and balance, the oral declaration shall have legal force'), and had expressly recognized in every paterfamilias, whether patrician or plebeian, a power of testamentary disposition (Uti legassit super [familia], pecunia, tutelave suae rei, ita jus esto. Ulpian, 11, 14).

The introduction of writing marks an era in mancipatory wills. Originally, the testator gave oral instructions to the familiae emptor, or purchaser of the family property, in the presence of the witnesses, as to the terms on which the property was to be held by him and distributed after the testator's death. These oral instructions, forming the lex mancipii, or conditions of the conveyance, called nuncupatio, served as a means, under the clauses of the Twelve Tables above cited, of nominating a heres. Hence a special lex curiata for this purpose was no longer necessary, and the familiae emptor, instead of being a kind of trustee for carrying out the testator's wishes, became a mere formality, used simply for the purpose of making the will mancipatory. Afterwards, for the sake of secrecy, the testator committed his intentions to writing, and the nuncupation became a mere form of publication, or general ratification of the directions contained in the tablets which the testator held in his hand, when he executed the mancipation.

§ 105. It is an intelligible rule, that a person interested in the validity of a will should be incompetent as a witness; and, when the familiae emptor was in the place of the heir, it was reasonable to disqualify for attestation any one united in interest to him. But when the mancipation was purely fictitious (imaginaria mancipatio, Ulpian, 20, 2; imaginaria venditio, Inst. 2, 10, 1), one sesterce being paid as the nominal price, and the imaginary vendee distinct from the heir, the continuance of this disqualification shows the tendency of the Romans to venerate rules after the principles on which they were founded had ceased to operate. In the meantime the heir, who was, strictly speaking, really interested, was competent to be a witness. Cicero, for instance, mentions that he and Clodius were both witnesses to a will in which they were appointed heirs, Pro Milone, 18, 48; but in the time of Gaius, as we see by the text,

§ 108, such attestation was at least questionable, and when Ulpian wrote it seems to have been inadmissible. The whole law on this subject was, however, deranged: totum jus conturbatum erat, Inst. 2, 10, 10: the transference of interest from the familiae emptor to the heres not being accompanied by a corresponding transference of testimonial disqualification from the relatives of the familiae emptor to the relatives of the heres. Justinian converted the advice of Gaius into a fixed rule of law, and disabled the heir and persons united to him by the bond of potestas from giving attestation, Inst. 2, 10, 10. Legatees retained their competency to attest.

§ 106. This statement of Gaius respecting a will of castrense peculium is inadvertently transferred to Justinian's Institutes, 2, 10, 9, but is inconsistent with a dictum of Ulpian's in the Digest: Per contrarium quaeri potest, an pater ejus, qui de castrensi peculio potest testari, adhiberi ab eo ad testamentum testis possit. Et Marcellus libro decimo Digestorum scribit posse: et frater ergo poterit, Dig. 28, 1, 20, 2. We have here, then, a case of Antinomy (contradictory laws) in Justinian's legislation. Vangerow, § 444, solves the antinomy by supposing that Ulpian speaks of a will made during service; the Institutes, like Gaius, of a will made post missionem.

By English law, 1 Vict. c. 26, any devise or legacy to an attesting witness is void, and the evidence of the witness admissible, and no person is incompetent to attest on account of being appointed executor.

In another form of will deriving its validity from the authority of the praetor, the form of mancipation was dropped, and the only authentication required was the apposition of the seals of seven attesting witnesses. Under such a will, however, the successor could not take the legal estate or hereditas, but only possession of the goods or bonorum possessio, §§ 119, 120, 148.

Before the time of Justinian, a form of will had been established deriving its validity from three orders of legislation (jus tripertitum), the civil law, the praetorian edict, and the imperial constitutions. In accordance with the last, the witnesses were required to sign or subscribe their names; in accordance with the praetorian edict they were required to attach their seals (signacula); and in accordance with the civil law, their number was required to be seven (a number obtained by adding the libripens and familiae emptor to the five witnesses of the mancipation), and the whole formality of attestation and publication was required to be continuous (unitas actus), that is, to proceed from beginning to end without interruption or interposition of any other business as one act. Inst. 2, 10, 3.

Another form of will is mentioned by Justinian as perfectly valid at civil law, the Nuncupative will, consisting solely of an oral declaration in the presence of seven witnesses, Inst. 2, 10, 14. A

modification of this produced one of the most solemn forms of testament. The nuncupation was made before the Praeses provinciae, or a judex; and thereupon a memorandum or protocol (insinuatio) of the testator's dispositions was made at length in the public records (acta or gesta) of the proceedings of the governor or court. This was called a public testament. Cod. 6, 23, 19.

By English law, 1 Vict. c. 26, only two witnesses are required to a will, whether of real or personal estate. The will must be in writing, signed at the end by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of the two witnesses, who must be present at the same time, and who must attest and subscribe the will in the presence of the testator.

[DE TESTAMENTIS MILITVM.]

§ 109. Sed haec diligens obseruatio in ordinandis testamentis militibus propter nimiam inperitiam *constitutionibus* principum remissa est. nam quamuis neque legitimum numerum testium adhibuerint neque uendider*int* familiam neque nun*cu*pauerint testamentum, recte nihilo minus testantur. Inst. 2, 11 pr.

§ 109. But from these strict rules in the execution of a will soldiers, in consideration of their extreme ignorance of law, have by imperial constitutions a dispensation. For neither the legal number of witnesses, nor the ceremony of mancipation or of nuncupation, is necessary to give force to their will.

§ 110. Praeterea permissum est iis et peregrinos et Latinos instituere heredes uel iis legare, cum alioquin peregrini quidem ratione ciuili prohibeantur capere hereditatem legataque, Latini uero per legem Iuniam.

§ 110. Moreover, they may make aliens and Latini (Juniani) their heirs or legatees, whereas under other wills an alien is disqualified from taking a succession or legacy by the civil law, and Latini by the lex Junia.

§ 111. Caelibes quoque qui lege Iulia heredita*tem* legataque capere uetantur; item orbi, id est qui liberos non habent, quos lex ——|

(48 *uersus in C perierunt*)

——|—prohibentur hi—|——

(6 *uersus in C legi nequeunt*)

——|—— eius more faciant—|

———|xxx ann*orum*——|——

(8 *uersus in C legi nequeunt*)

———|—— res ——|—

(2 *uersus in C legi nequeunt*)

———|—

§ 111. Celibates also, whom the lex Julia disqualifies for taking successions or legacies, and childless persons whom the lex Papia prohibits from taking more than half a succession or legacy (see § 286), are exempt from these incapacities under the will of a soldier.

§ 109. The military will could only be executed during actual service, and in this period only when the soldier was in camp, not when he was at home or on leave of absence. A will made after the soldier's discharge from service or during his absence from camp was governed by the same rules as the will of a civilian (paganus). A military will, executed without the ordinary formalities, only remained valid during a year after discharge from service. Inst. 2, 11, 3.

TESTAMENTI FACTIO.

§ 112. —*ex auctoritate* diui Hadriani senatusconsultum factum est quo permissum est |———feminis etiam sine coemptione te|stamentum facere, si modo non minores essent ann*orum* XII, scilicet ut quae tutela liberatae non essent, *tutore auctore* testari deb*e*rent.

§ 112. But a senatusconsult under the late emperor Hadrian, as already mentioned (1 § 115 *a*), made coemption unnecessary, and permitted women to make a will on attaining 12 years of age, only requiring their guardian's sanction if they were still in a state of pupilage.

§ 113. Videntur ergo melioris condicionis esse feminae quam masculi; nam masculus mino*r* ann*orum* XIIII testamentum facere non potest, etiamsi tutore auctore testamentum facere uelit, femina uero post XII ann*um* testamenti faci*e*nd*i* *i*us nanciscitur.

§ 113. Women, then, are in a better legal position than males, for a male under 14 years of age cannot make a will, even with his guardian's sanction, but a female acquires testamentary capacity as soon as she is 12 years old.

§ 114. Igitur si quaeramus an ualeat testamentum, inprimis aduertere debemus an is qui id fecerit habuerit testamenti factionem; deinde si habuerit, requiremus an secundum iuris ciuilis regulam *te*status sit, exceptis militibus, qui*bus* propter nimiam *inpe*ritiam, ut diximus, quomodo uelint uel quomo*do* *poss*int, permittitur testamentum facere.

§ 114. Accordingly, to determine the validity of a will, we must first ascertain whether the testator had testamentary capacity; next, if he had, whether he conformed to the requisitions of the civil law in its execution, with this reservation, that soldiers, on account of their extreme ignorance of law, as was mentioned, are allowed to make their wills in any way they like and in any way they can.

§ 112. On the lost leaf of the Veronese codex Gaius proceeded to mention the classes who were incompetent to make a will. Among these would be the filiusfamilias, who could only dispose of his peculium castrense. Cf. Inst. 2, 12; Ulp. 20, 10; Epit. 2, 2, 1.

§ 114. Testamenti factio is a term applied, (A) to the Testator, Testamenti factio activa; (B) to the object of his bounty, Testamenti

factio passiva; (C) to the witnesses. Let us consider it in each of these applications.

(A) Testamenti factio activa sometimes comprehends all the conditions (physical included) of testamentary capacity, and then it excludes children below the age of puberty and lunatics: but the proper meaning of testamenti factio is the qualification by Status for mancipatio, and consequently for the mancipatory will: that is to say, it is equivalent to Commercium, and therefore is ascribed to all cives, all Latini, and all aliens who have received a grant of commercium.

To make a will, however, a testator must have not only personal capacity, but he must also have property to leave. This latter condition is necessarily wanting to the Filiusfamilias and to the Latinus Junianus: in their case, therefore, Testamenti factio does not mean capacity of being testator, but of playing some other part in the mancipatory will; i. e. of being heir, or legatee, or witness.

The testator's capacity is required at two periods: at the time of making the will and at the time of the testator's death. The strict civil law also required the continuance of capacity during the interval between these dates: but the praetor disregarded any intervening incapacity (capitis diminutio minima), and, notwithstanding such an event, gave the will efficacy by granting to the heir, not the civil hereditas (which was beyond his power), but juxta-tabular possession (bonorum possessio juxta or secundum tabulas), §§ 145–147, comm., Ulpian 23, 6. Dig. 37, 11, 1, 8 Exigit praetor ut is cujus bonorum possessio datur utroque tempore jus testamenti faciendi habuerit, et quum facit testamentum et cum moritur. . . . Sed si quis utroque tempore testamenti factionem habuerit, medio tempore non habuerit, bonorum possessio secundum tabulas peti poterit.

Two other cases of incapacity were cured by the principle of postliminy and the lex Cornelia testamentaria: if a testator suffered capitis diminutio maxima by falling into the hands of the enemy, when he returned from captivity his will reacquired validity by the operation of postliminy: if he never returned his will obtained validity by the fiction that he died a moment before his capture. Dig. 28, 3, 6, 12 Quatenus tamen diximus ab hostibus capti testamentum irritum fieri, adjiciendum est postliminio reversi vires suas recipere jure postliminii, aut si ibi decedat, lege Cornelia confirmari. Dig. 49, 15, 18 In omnibus partibus juris, is, qui reversus non est ab hostibus, quasi tunc decessisse videtur, cum captus est. Ulpian, 23, 5.

The physical conditions of testamentary incapacity (infancy, lunacy) are only critical at the date of making the will.

(B) The Honoratus or the recipient of the testator's bounty,

whether heres or legatarius, required testamenti factio passiva, which like testamenti factio activa meant Commercium or capacity of taking part in mancipatio. Accordingly both a filiusfamilias and a Latinus could be heres or legatee (for the limitation, however, of the capacity of Latinus Junianus by the lex Junia see below). This capacity must exist at three periods (tria tempora): the making of the will, the death of the testator, and the acquisition of the succession by the heres (aditio). The interval between the making of the will and the death of the testator was immaterial, Inst. 2, 19, 4, Dig. 28, 5, 60, 4. The interval between the death of the testator and the aditio of the heres was material, because on the first heres institutus becoming incapable the inheritance would be instantaneously delated (offered for acceptance) to the heres substitutus or to the heres ab intestato.

The looking to the capacity of Honoratus at the date of making the will as well as later, though apparently based on no motives of testamentary policy, but only due to the mancipatory form of the primitive will, which was ostensibly a mancipatio inter vivos, i. e. a disposition taking effect in the lifetime of the mancipator, was retained in Justinian's legislation after wills had lost their mancipatory form.

In respect of Honoratus it is necessary to distinguish institutio from acquisitio (aditio); and testamenti factio passiva, competence for institution, from capacitas or jus capiundi, competence for acquisition. Testamenti factio passiva was required at the date of the making of the will; and in its absence a disposition was deemed to be unwritten (pro non scripto habetur); and the property disposed of went by Accretio to the other heredes scripti. Capacitas, in its distinctive sense, was only required at the date of acquisition; and in its absence the unacquired property became caducous, and devolved in part or in whole to persons fulfilling certain conditions or to the state, as determined by the laws of caducity.

Incapaces, or persons who, from want of capacity to take, forfeited part or the whole of the testator's bounty, comprehended:

(1) Latini Juniani, who were made incapable by the lex Junia, 1 § 23, 2 §§ 110, 275. Cf. Ulpian, 17, 1.

(2) The unmarried (caelibes) were totally, and the married but childless (orbi) were made partially incapable by the lex Papia Poppaea.

(3) Husband or wife (vir et uxor), who by the same law could only take, as between one another if they had no children, one tenth of a heritage, and another tenth for every living child by a former marriage: further, another tenth for a common child that lived to the day of naming (nominum dies), or as Mommsen (Staatsr.

3, 202) would read the MS. of Ulpian, after the ninth day (nono die), or two tenths for two such children, but not more. In addition to their tenth, the husband or wife who were childless might have the usufruct of a third part, and, if they had had children, the property in a third, Ulpian, 1, 15.

These disqualifications were not recognized in Justinian's legislation: so that at that period the distinction between capacitas and testamenti factio passiva had lost much of its importance. We find, however, under Justinian the penalty of forfeiture (ereptio, ablatio) for Indignitas. Indigni were persons deemed on various grounds unworthy of the testator's bounty. The devolution of the property intended for them followed different rules from those which governed other cases of Incapacity. See § 151, comm.

(C) Testamenti factio was further applied to designate the qualification of the witnesses to a will. This was only required to exist at one period, the date of the execution of the will.

§ 113. By English law, the age at which a person was competent to make a will was formerly the same as by Roman law, namely, 12 years for females, 14 years for males; but now, by 1 Vict. c. 26, no one is competent to make a will before attaining 21 years of age.

BONORVM POSSESSIO SECVNDVM TABVLAS.

§ 115. Non tamen, ut iure ciuili *ualeat* testamentum, sufficit ea obseru*at*io quam supra exposuimus de familiae uenditione et de testibus et de nuncupationibus.

§ 116. ⟨*Sed*⟩ ante omnia requirendum e*st*, a*n* institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita uenire testesque ita adhibere *et ita* nu*nc*upare testamentum, ut supra diximus.

§ 117. Sollemnis autem institutio haec est TITIVS HERES ESTO; sed et ill*a* iam conprobata uidetur TITIVM HEREDEM ESSE IVBEO; at illa non est conprobata TITIVM HEREDEM ESSE VOLO; sed et illae a plerisque inprobatae s*u*n*t* TITIVM HEREDEM INSTITVO, item HEREDEM FACIO.

§ 115. The civil law, however, is not satisfied by our observing the requisitions hereinbefore explained respecting mancipation, attestation, and nuncupation.

§ 116. Above all things, we must observe whether the institution of an heir was in solemn form; for if the institution of an heir was not in the prescribed form, it is unavailing that the mancipation, attestation, nuncupation, were regular.

§ 117. The solemn form of institution is this: 'Be Titius my heir.' The following also seems now to be recognized: 'I order that Titius be my heir.' 'I wish Titius to be my heir' is not admitted; and most reject the following: 'I institute Titius my heir,' 'I make Titius my heir.'

§ 118. Obseruandum praeterea est, ut si mulier quae in tutela est faciat testamentu*m*, tutor*e* *auctore* facere debeat; alioquin inutiliter iure ciuili testabitur.

§ 118. It is also to be remembered that a woman who has a guardian must have her guardian's sanction to make a will, otherwise her will is invalid at civil law.

§ 119. Praetor tamen si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti b*onorum* ⟨*possessionem*⟩ pollicetur: ⟨*et*⟩ si nemo sit ad quem ab intestato iure legitimo pertineat hereditas, uelut frater eodem patre natus aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex *causa* testamentum non ualeat, uelut quod familia non uenierit aut nuncupationis uerba testator locutus non sit.

§ 119. The praetor, however, if the will is attested by the seals of seven witnesses, promises to put the persons named in the will in juxta-tabular possession, and if there is no one to take the inheritance by statutory right under the rules of intestacy, a brother by the same father, for instance, a father's brother, or a brother's son, the persons named in the will are able to retain the inheritance; for the rule is the same as if the will is invalid from any other cause, as because the familia has not been sold or because the words of nuncupation have not been spoken.

§ 120. Sed uideamus an etiamsi frater aut patruus extent, potiores scriptis heredibus habeant*ur*. rescripto enim imperatoris Antonini significat*ur*, eos qui secundu*m* tabulas testamenti non iure factas bonorum possessionem petierint, posse aduersus eos qui ab intestato uindicant hereditatem defendere se per exceptionem doli mali.

§ 120. But are not the heirs named in the will preferred even to a brother and paternal uncle? since the rescript of the emperor Antoninus permits the person named in the will who has obtained juxta-tabular possession under an informal will to repel the claimants in intestacy by the plea of fraud.

§ 121. Quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quae ideo non utiliter testatae sunt, qu*ia* uerbi gratia familiam non ue*n*diderint aut nuncupationis uerba locutae non sint; an autem et ad ea testamenta feminarum quae sine tutoris auctoritate fecerint haec constitutio pertineat, uidebimus.

§ 121. This certainly applies both to the wills of males and also to the wills of females which are informal for such faults as omission to sell the familia or to say the words of nuncupation: whether the constitution applies also to wills of females executed without their guardian's sanction, is a question.

§ 122. Loquimur autem de his scilicet feminis quae n*on* in legitima paren*t*um aut patronorum tutela s*unt*, sed [de his]

§ 122. We are not speaking of females who are the statutory wards of their parent or patron, but of those who are wards of the

quae alterius generis tutores habent, qui etiam inuiti coguntur auctores fieri; alioquin parentem et patronum sine auctoritate eius facto testamento non summoueri palam est.

other sort of guardian, who are compellable to give their sanction; for a parent or patron can certainly not be displaced by a will he has not chosen to sanction.

§ 117. The necessity of using formal words in the institution of an heir was abolished by a constitution of Constantius and Constans, A. D. 339, Cod. 6, 23, 15.

As to the nomenclature employed in the following exposition of Roman testamentary law, it must be observed that as the Roman conception of Heres is not found in English law, so we have no legal term corresponding to it. In the language of English jurisprudence Heir denotes a successor to real estate, while Executor, the notion of which is derived to some extent from Roman law, denotes a successor appointed to succeed to personal property. Again Heir denotes a successor to real estate in case of intestacy. Devisee denotes a successor to real estate under a will.

The word Executor is not available as a translation of heres. The Executor of English law, unless also a legatee, holds a merely onerous office; whereas the heres of Roman law was always, if there was any residue, a beneficiary. The Roman heres, in fact, united the characters of the English Executor and residuary legatee: and the lex Falcidia provided that the residue should as against the claims of legatus always amount to a fourth of the testator's property. Nor is the executor, like the heres, personally liable for the debts of the deceased beyond assets.

In translating the word Heres heir, which is convenient from its relation to the indispensable terms disinherit and disinheritance, an English reader must not be misled by false associations with Real Property law, but must understand that it is used to signify the Universal successor of Roman law, whether designated by will or by the rules of intestacy.

Bequest (which in English law is related to personalty as devise to realty) has been used in connexion with legacies, i. e. with dispositions in favour of legatarius as opposed to heres; in favour, that is, of a person who takes a single thing or things belonging to the testator, not his familia, that is, the Universitas of his rights and obligations, or a fraction of this Universitas.

§§ 119, 120. The praetor only sustained a testament in spite of its civil invalidity when the grounds of civil invalidity were want of mere external formalities (mancipation, nuncupation), not against more serious defects, such as preterition of self-successor. He sustained it, however, against the preterition of suus postumus, if suus postumus died before the testator, Dig. 28, 3, 12.

The praetorian succession, or right of succession introduced by the praetor under the name of Bonorum possessio, sometimes as supplementary to, and sometimes in the place of, civilis hereditas, may be divided into testate succession and intestate succession. The latter branch (bonorum possessio intestati) was firmly established at an earlier period than the former (bonorum possessio secundum tabulas). The rescript mentioned by Gaius, § 120, which is attributed by some writers to Antoninus Pius and by others to Marcus Aurelius, as is the more probable view, may be regarded as having definitively established the validity of the praetorian testament, not simply when supplementary to, but also when in opposition to, jus civile; in other words, a praetorian will might make a person bonorum possessor cum re, although the inheritance was claimed by some one with a valid civil title.

In its origin Bonorum possessio was probably only the provisional or interimistic possession granted to one of the parties in a suit of Hereditatis petitio, cf. Sohm, § 110. This suit was a species of Real action (actio in rem), and in all Real actions it is necessary to determine which of the litigants shall have possession during the pendency of the litigation. In the earliest period, that of statute-process (legis actio), the interim possession was called vindiciae, and the praetor who assigned it to one of the parties was said vindicias dicere, 4 § 16. In making the grant of vindiciae he was probably governed by the same rule which afterwards prevailed when the question of interim possession was determined by application of the Interdicts Utrubi and Uti possidetis: that is to say he probably allowed the party in actual possession to continue in possession. But this rule was inapplicable to the case of Hereditatis petitio, for at the decease of the proprietor who leaves an inheritance not one of the claimants to succeed may be in actual possession. Here accordingly the grant was governed by different principles: if a will, prima facie valid, was propounded, possession was granted to the claimant under the will (bonorum possessio secundum tabulas): if no such will was propounded, possession was granted to the civil heirs, the self-successor (suus heres) being eventually allowed to claim bonorum possessio unde liberi, coming before the nearest agnates (legitimi). Then as supplementary to the civil law, persons who were not recognized as heredes, namely persons claiming under a praetorian will, till they were preferred by statute to agnates, § 120, and next cognates (bonorum possessio unde cognati), and the wife or husband, as such (bonorum possessio unde vir et uxor), were put in possession in default of other heirs: children (liberi), who by emancipation had lost the character of self-successors, were nevertheless admitted to possession in the first order in preference to agnates of the second order, just as if they had continued unemancipated

(bonorum possessio unde liberi). The right of provisional possession of course corresponded to a presumptive right of definitive ownership.

Although a will was propounded, yet if a descendant of the testator, who would have been self-successor if he had not been emancipated, was therein pretermitted (praeteritus), i.e. not either instituted heir or disinherited, possession was granted to such pretermitted descendant (bonorum possessio contra tabulas). Contra-tabular possession did not make a will absolutely void as the passing over of suus heres might do: if the praeteritus was an emancipated son, although he obtained contra-tabular possession, he was bound, as we shall see, by some of the dispositions of the will; so that his succession was partly intestate, partly testate.

§ 122. In ancient Rome, females, even after attaining their majority, were subject to perpetual guardianship. In the time of Gaius, the only survival of such guardianship to which they continued really subject appears to have been that of ascendants and patrons, cf. 1 §§ 189–193; 2 §§ 85, 112. But before the time of Justinian even this had ceased.

DE EXHEREDATIONE LIBERORVM.

§ 123. Item qui filium in potestate habet curare debe*t*, ut eum uel heredem instituat uel nominatim exheredet; alioquin si eum silentio praeterierit, inutiliter testabitur, adeo quidem, ut nostri praeceptores existiment, etiamsi uiuo patre fili*us* defunctus sit, neminem heredem ex eo testamento existere posse, qu*ia* scilice*t* statim ab initio non constiterit institutio. sed diuersae scholae auctores, siquidem fili*us* mortis patris tempore uiuat, sane inpedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur; si uero ante mortem patris interceptus sit, posse ex testamento hered*itat*em adiri putant, nullo iam filio inpedimento; quia scilicet existimant ⟨*non*⟩ sta*tim ab* initio inutiliter fieri *testa*mentum filio praeterito. Inst. 2, 13 pr.

§ 123. Moreover, a testator who has a son in his power must take care either to institute him heir or to disinherit him individually, for passing him over in silence invalidates the will. So much so, that according to the Sabinians, even if the son die in the lifetime of the father, no one can take as heir under the will on account of the original nullity of the institution. But the followers of the other school hold that although the son, if alive at the time of his father's death, bars the heirs mentioned in the will and takes as self-successor by intestacy, yet, if the son die before the father, the heirs under the will may succeed, the son being no longer in their way, because according to this view the will was not void ab initio by his silent pretermission.

§ 124. Ceteras uero liberorum personas si praeterierit testator, ualet testamentum ⟨*sed*⟩ praeteritae istae personae scriptis heredibus in partem adcrescunt, si sui heredes sint, in uirilem, si extranei, in dimidiam. id est si quis tres uerb*i* gratia fili*o*s heredes instituerit et filiam praeterierit, filia adcrescendo pro quarta parte fit heres, et ea ratione id*em* consequitur, quod ab intestato patre mort*uo* habitura esset; at si extraneos ille heredes instituerit et filiam praeterierit, filia adcrescendo ex dimidia parte fit here*s*. quae de filia diximus, eadem et de nepote deque omnibus liberorum personis *seu* masculini seu *f*eminini sexus dicta intellegemus. Inst. l. c.

§ 125. Quid ergo est? licet *eae* secundum ea quae diximus scriptis *heredibus dimidiam partem* detrahant, tamen praetor eis contra tabulas bonorum possessionem promitti*t*, qua ratione extranei heredes a tota hereditate repelluntur et efficiuntur sine re heredes.

§ 126. Et hoc iure uteb*amur*, *qua*si nihil inter feminas et masculos interesset; sed nuper imperator Antoninus significauit rescripto su*as* non plus nancisci feminas per bonorum possessionem, qu*am* qu*od* iure adcrescendi consequerent*ur*. quod in emancipatarum quoque persona obseruandum es*t*, *ut hae quoque*, *quod* adcrescendi iure habitur*ae* esse*nt*, si in po*testate* fuissent, id ipsum etiam per bonorum possessionem habeant.

§ 127. Sed siquidem filius a

§ 124. By the pretermission of other self-successors a will is not avoided, but the omitted persons come in to share with the heirs named in the will, taking an aliquot part if the latter are self-successors, a moiety if they are strangers. Thus if a man has three sons and institutes them heirs, saying nothing of his daughter, the daughter comes in as co-heir and takes a fourth of the estate, being entitled to the portion which would have devolved on her by intestacy: but when the instituted heirs are strangers, the daughter, if passed over, comes in and takes a moiety. What has been said of the daughter applies to the son's children, male and female.

§ 125. But though a female according to this statement of the law only deprives the heirs under the will of a moiety, the praetor promises to give her contra-tabular possession, so that, if strangers, they lose the whole, and become heirs without taking anything.

§ 126. And this was once the law, and there was no distinction between males and females; but the Emperor Antoninus has recently decided by rescript that female self-successors shall not take more by contra-tabular possession than they would by coming in as co-heirs at civil law, by right of accrual. And the same rule applies to emancipated daughters, that is, they obtain by contra-tabular possession the same shares as they would have obtained as co-heirs by right of accrual if they had not been emancipated.

§ 127. A son must be disin-

patre exheredetur, nominatim ex*here*dari *debe*t; alioquin non *uidetur* exheredari. nominatim autem *ex*heredari uidetur, siue ita exheredetur *TI*TI*VS* FILIVS MEVS EXH*ERES ESTO*, *siue ita FILIVS MEVS* | EXHERES ESTO, non adiecto proprio nomine.
Inst. 2, 13, 1.

herited individually; otherwise the disherison is invalid. Individual disherison may be expressed in these terms: Be Titius my son disinherited: or in these: Be my son disinherited, without inserting his name.

§ 128. Ceterae uero liberorum personae uel femini sexus uel masculini sa|tis inter ceteros exheredantur, id est his *uerbis CETE*|*RI* OMNES EXHEREDES SVNTO, *quae uerba* ——— *post in*|stitutionem heredum adici solent. sed hoc ita*—* |.
Inst. l. c.

§ 128. Other male and all female self-successors may be sufficiently disinherited inter ceteros thus: Be the remainder disinherited, which words usually follow the institution of the heir: this, however, is only the rule of the civil law.

§ 129. Nam praetor omnes uirilis sexus lib*erorum personas*, | id est nepotes quoque et pronepotes——|———|———|.

§ 129. For the Praetor requires all male self-successors, sons, grandsons, greatgrandsons, to be disinherited individually, although he permits females to be disinherited in an aggregate (inter ceteros), and, failing such disherison, promises them the contra-tabular succession.

§ 130. Postumi quoque liberi *uel heredes insti*tui debent uel exheredari.

§ 130. Children born after the making of the will must either be instituted heirs or disinherited.

§ 131. Et i*n* eo par omnium condic*io est*, *quod* ⟨*et*⟩ *in* filio *postumo et in quolibet ex ceteris liber*is siue *feminini sexus siue ma*sculini praeterito ualet *quidem testamentum, sed postea agnatione postumi si*ue postumae rumpit*ur*, et ea *ratione totum infir*matur. *ideoque* si mulier ex qua *postumus aut postu*ma sperab*atur* abor*tum fecerit, nihil inpedimento est scriptis heredibus ad hereditatem adeundam.* Inst. l. c.

§ 131. And in this respect all stand in the same position, that if a son or any other child, male or female, born after the making of the will, be passed over in silence, the will is originally valid, but subsequently rescinded and totally avoided by the birth of the child; so that if the woman from whom a child was expected have an abortive delivery, there is nothing to prevent the heirs named in the will from taking the succession.

§ 132. *Sed feminini* quidem sexus personae *uel nominatim uel inter* ceteros *exheredari solent, dum tamen si inter*

§ 132. Female self-successors born after the making of the will may be disinherited either individually or inter ceteros, with

ceteros exheredentur, aliquid eis legetur, ne uideantur per obliuionem praeteritae *esse. masculini uero sexus personas* placuit non aliter recte ex*heredari, quam si nominatim exheredentur, hoc scilicet modo* QVICVMQVE MIHI FILIVS GENITVS FVERIT EX|HERES ESTO. Inst. 1. c.

this proviso, that if they are disinherited inter ceteros, some legacy must be left them in order that they may not seem to have been pretermitted through forgetfulness. Male self-successors, sons and further lineal descendants, are held not to be duly disinherited unless they are disinherited individually, thus: Be any son that shall be born to me disinherited.

§ 132 *a.* ——| potest u——|— (4 *uersus in C legi nequeunt*) ———|———agat——|n——|.

§ 133. *Postumorum autem loco sunt et hi qui in sui heredis* | *locum succedendo quasi agnascendo fiunt parenti*|bus sui heredes. ut ecce si filium et *ex eo nepotem ne*|ptemue *in potestate habeam, quia filius gradu praecedit,* | *is solus iura sui heredis habet, quamuis nepos quo*|que et neptis *ex eo in eadem potestate sint; sed si filius meus me uiuo moriatur, aut qualibet ratione exeat de potestate mea, incipit nepos neptisue in eius locum succe*|*dere, et* eo modo iura suorum h*eredum quasi agnatio*|ne nanciscuntur. Inst. 2, 13, 2.

§ 133. With children born after the making of the will are classed children who by succeeding to the place of self-successors become subsequent self-successors like the afterborn. For instance, if a testator have a son, and by him a grandson or granddaughter under his power, the son being nearer in degree alone has the rights of self-successor, although the grandson and granddaughter are equally in the ancestor's power. But if the son die in the lifetime of the testator, or by any other means pass out of the testator's power, the grandson and granddaughter succeed to his place, and thus acquire the rights of self-successors to the testator just as if they were children born after the making of the will.

§ 134. Ne ergo eo modo rumpatur mihi te|sta*mentum, sicut ipsum filium uel heredem in*stituere uel | exheredare debeo, ne n*on iure faciam testamentum, ita et ne*|potem *neptemue* ex eo necesse est mihi u*el heredem instituere uel exheredare, ne forte, me uiuo filio mortuo, succedendo in locum eius nepos neptisue* quasi agnatione rumpat testamentum ; id-

§ 134. To prevent this subsequent rupture of my will, just as a son must be either instituted heir or disinherited individually to make a will originally valid, so a grandson or granddaughter by a son must be either instituted heir or disinherited, lest if the son die in the testator's lifetime the grandson and granddaughter should take his place and rupture the will in the same way as if they had been children born

que lege Iunia Vellaea prouisum est, in qua simul exheredationis modus notatur, ut uirilis sexus ⟨*postumi*⟩ nominatim, feminini uel nominatim uel inter ceteros exheredentur, dum tamen iis qui inter ceteros exheredantur aliquid legetur.

Inst. l. c.

after the execution of the will. The lex Junia Vellaea allows this and directs them to be disinherited like children born after a will is executed, that is to say, males individually, females either individually or inter ceteros, provided that those who are disinherited inter ceteros receive some legacy.

§ 135. *E*mancipatos liberos iure ciuili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes; sed praetor omnes tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, uirilis sexus *n*ominatim, feminini u*el* nominatim uel inter ceteros; quodsi neque heredes instituti fuerint neque ita ut supra diximus exheredati, praetor promittit eis contra tabulas bonorum possessionem. Inst. 2, 13, 3.

§ 135. Emancipated children by civil law need neither be appointed heirs nor disinherited because they are not self-successors. But the Praetor requires all, females as well as males, unless appointed heirs, to be disinherited, males individually, females either individually or inter ceteros, and if they are neither appointed heirs nor disinherited as described, the Praetor promises to give them the contratabular possession.

§ 135 *a*. In potestate patr*is* non sunt qui cum eo ciuitate Romana donati *su*nt nec in accipienda ciuitate Romana pater *petiit*, ut eos in potestate habere*t*, aut, si petiit, no*n* inpetrauit, nam qui ⟨*in*⟩ pot*estatem* patris ab imperatore rediguntur nihil differunt a——.

§ 135 *a*. Children who are made Roman citizens along with their father are not subject to his power, if at the time he either omitted to petition for, or failed to obtain, a grant of patria potestas: for those who are subjected to the father's power by the emperor differ in no respect from those under power from time of birth.

§ 136. Adoptiui filii quamdiu manent in adoption*e* naturalium loco sunt; emancipati uero ⟨*a*⟩ patre adoptiuo neque iure ciuili neque quod ad edictum praetoris pertinet, inter liberos numerantur.

Inst. 2, 13, 4.

§ 136. Adoptive children, so long as they continue in the power of the adoptive father, have the rights of his natural children: but when emancipated by the adoptive father they neither at civil law nor in the Praetor's edict are regarded as his children.

§ 137. Qua ratione accidit ut ex diuerso quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiua familia, extraneorum numero habeantur; si uero emancipati fuerint

§ 137. And conversely in respect of their natural father as long as they continue in the adoptive family they are reckoned as strangers: but when emancipated by the adoptive father they have

ab adoptiuo patre, tunc incipiant in ea causa esse qua futuri essent, si ab ipso naturali patre ⟨*emancipati*⟩ fuissent.
Inst. l. c.

the same rights in their natural family as they would have had if emancipated by their natural father (that is, unless either instituted heirs or disinherited by him, they may claim the contratabular succession).

§ 123. The praeterition of suus heres, another circumstance which as well as testamenti factio affected the validity of a will, was at civil law critical both at the time of making the will and at the time of the testator's death and in the interval: but in later times this defect of a will was healed by the praetor, who granted juxta-tabular possession if the defect only existed at the first and third period, Dig. 28, 3, 12 pr., so that practically the existence of a pretermitted suus heres at the time of the testator's death was alone important.

The necessity of disinheriting a suus heres is grounded on the principle of primitive law, that the child is co-proprietor with the parent: hence, unless something occurs to divest the child of his property, he will simply become sole proprietor by survivorship on the death of his father. Dig. 28, 2, 11, 'In self-succession we have a still more striking instance of an unbroken continuity of dominion, for there appears to be no vesting by it of new property by inheritance, but the heir is deemed to have been previously proprietor even during the lifetime of the father. Hence the names filiusfamilias and paterfamilias imply a similar kind of legal relation to the patrimony, though one is parent and the other child. Therefore the death of the parent occasions no acquisition of new property by inheritance, but only an increased freedom in the administration of already existing property. Hence, even in the absence of testamentary institution, a self-successor is proprietor: and it is no objection to this, that a parent has the power of disinheriting a self-successor, for he also had the power of putting him to death.'

The characteristic of the Roman will that it grounded a Universal succession (unlike the English will which may be a merely Partial definition of the succession), which is expressed in the maxim, Nemo pro parte testatus, pro parte intestatus decedere potest, had its historic origin, not probably in a perception of its manifold utility, but in the primitive form of the will—a proposal, perhaps in the form of an adoption, laid before the legislative assembly for its sanction, § 101. The assembly could no more judge of the justice of a proposed arrangement without having laid before it the whole plan of succession than it could judge of the fairness of a contract by inspection of a single paragraph. It could not therefore allow the testator merely to lay before it certain partial modifications of the

intestate succession and leave the rest of his inheritance to follow the general rules of intestacy, without further informing the assembly of their operation. Nor were the testamentary powers, conferred by the Twelve Tables, on which the mancipatory will was founded, intended to be used so as to defeat the claims of sui heredes (Muirhead, Roman Law, § 32). These considerations involve the rules respecting the effect of Praeteritio. If the testator's dispositions were valid in spite of Praeteritio, he would have it in his power to commit a fraud upon the assembly by suppressing some element that was material to enable them to form a judgement. Accordingly Praeteritio was made to defeat itself, in the case of the son by nullification (inutilitas), in the case of other issue by Accretio, § 124. However, although by the Civil law Praeterition avoided a will and was not cured by the death of Praeteritus before Testator, yet Praetorian law only regarded the date of Testator's death, and, if no Praeteritus was then existent, counteracted the nullity of the will by Juxta-tabulation.

After the introduction of the mancipatory will the fraud against the legislature would cease to be a motive for the rule requiring the testator to define a Universal succession; but the rule was retained for the sake of continuity and in order to force the testator to have before his mind a clear and systematic view of his intentions by requiring their simultaneous expression in a single act. It secured the after-born from oblivion and protected the son who was falsely supposed to be dead from the consequences of the testator's error. At the latest period the use of Codicils permitted to a certain extent the partial and fragmentary disposition of a patrimony, but this was not extended to the principal point, the heredis institutio. Ihering, § 53.

§ 124. Justinian abolished this accretion and equalized the sexes, enacting that the pretermission of any suus heres or sua heres should absolutely vacate a will, and entitle to bonorum possessio contra tabulas, like the pretermission of the son, Cod. 6, 28, 4; Inst. 2, 13, 5.

§ 127. Justinian abolished this distinction and required that all sui heredes should be disinherited individually like the son, ibid.

§ 130. Afterborn children (postumi), that is, children born after the making of a will, are uncertain persons, and, by the general rule that uncertain persons cannot be instituted or disinherited (incerta persona heres institui non potest, Ulpian 22, 4), ought to be incapable of institution or disinheritance, and, therefore, if they are sui heredes, would necessarily invalidate a will, because every will is informal when there exists a suus heres who is neither instituted nor disinherited. If the suus heres was born in the lifetime of the testator, the revocation of the will would not be an irremediable evil, because the testator would still have it in his power to make another will, and accordingly in this case the civil law left the general rule to

operate. But if the suus heres were born after the death of the testator, the evil would be irreparable, and the testator would die intestate. To prevent this, the civil law made an exception to the rule that an uncertain person cannot be instituted or disinherited, and permitted the institution or disinheritance of any suus heres who should be born after the death of the testator: and on the authority of the celebrated jurist Aquilius Gallus, the inventor of a form of acceptilation (3 § 170), this power was extended to the institution or disinheritance of any afterborn grandchild of the testator whose father should die in the interval between the making of the will and the death of the testator. Dig. 28, 2, 29 pr. Gallus sic posse institui postumos nepotes induxit: Si filius meus vivo me morietur, tunc si quis mihi ex eo nepos sive quae neptis post mortem meam in decem mensibus proximis, quibus filius meus moreretur, natus nata erit, heredes sunto. 'Gallus Aquilius introduced the institution of afterborn grandchildren in the following manner: If my son die in my lifetime, then let any grandson or granddaughter by him who may be born after my death within ten months after the death of my son, be my successor.' Such grandchildren are called Postumi Aquiliani.

In respect of the suus heres born after the making of the will but in the lifetime of the testator, the case which the civil law left to the operation of the general rule, it might certainly be sometimes possible to make a new will after his birth, but it might sometimes be impossible or highly inconvenient; and accordingly the lex Junia Vellaea, which was probably passed at the close of the reign of Augustus, in its first chapter permitted such sui heredes, being children of the testator, and also grandchildren of the testator born after their father's death in the lifetime of their grandfather, to be instituted or disinherited. Such children and grandchildren were called Postumi Vellaeani primi capitis. In its second chapter it permitted the institution or disinheritance of another class of uncertain persons, viz. quasi-afterborn children (postumorum loco); grandchildren, for instance, who were born before the making of the will, but whose acquisition of the character of sui heredes by the decease of their father is subsequent to the making of the will.

Such grandchildren are called Postumi Vellaeani secundi capitis.

Besides the Postumi Aquiliani, the Postumi Vellaeani primi capitis and the Postumi Vellaeani secundi capitis, the jurist Salvius Julianus, who systematized the Edict, established the validity of the institution or disinheritance of a fourth class, intermediate between the Postumi Vellaeani of the first and second chapter: grandchildren, namely, who, like the Vellaeani of the first chapter, were born after the making of the grandfather's will, but who, like those of the second chapter, were born before the death of their father. Such

grandchildren are not sui heredes to their grandfather at their birth, but only by succession, that is by the subsequent death of their father, like those of the second chapter, Dig. 28, 2, 29, 15.

The following is a conspectus of the different kinds of Postumi sui, i. e. descendants who after the making of a will come into the immediate power of a testator, whether (A) children or (B) grandchildren: to remoter descendants analogous principles will apply.

(A) Children are either

(*a*) Veritably afterborn, that is to say born after their father has made his will, whether after their father's decease, in which case the civil law treated them as certae personae, or in their father's lifetime, in which case they form a subdivision of Velleiani primi capitis:

(*b*) Or quasi-afterborn (loco postumorum), i. e. quasi-sons or quasi-daughters by adrogatio, adoptio, legitimatio, in manum conventio.

(*c*) Another quasi-afterborn is the child who falls under the immediate power of his soldier father, that is, becomes his suus heres, in consequence of the death of his grandfather, in whose power he previously was, after his father had made a will of castrense peculium. Dig. 28, 2, 28, 1.

(B) Afterborn grandchildren who, as self-successors to their grandfather, require institution or disinheritance in his will fall into four classes, differentiated by the order of priority in which certain events occur, as hereunder indicated:

POSTUMI AQUILIANI,

Will of grandfather: Death of father: Death of grandfather: Birth of grandchild.

POSTUMI VELLAEANI PRIMI CAPITIS,

Will of grandfather: Death of father: Birth of grandchild: Death of grandfather.

POSTUMI SALVIANI,

Will of grandfather: Birth of grandchild: Death of father: Death of grandfather.

POSTUMI VELLAEANI SECUNDI CAPITIS,

Birth of grandchild: Will of grandfather: Death of father: Death of grandfather.

The last two cases depend on the principle of successio. The grandchild is at birth in the power of his grandfather, but is not his suus heres, so long as there is an intervening ascendant—the father—in the same power. On the death of the intervening ascendant the grandchild is said to succeed to his place, and becomes by such succession suus heres to his grandfather.

The afterborn stranger, though incapable at civil law of being appointed heir (§ 242), was relieved by the praetor who gave him the juxta-tabular possession. Justinian gave him a civil title, Inst. 3, 9 pr.

§ 132. To the necessity of leaving some legacy to the disinherited afterborn sua heres (and not, as Blackstone suggests, to the querela inofficiosi) we may perhaps attribute the vulgar error in England of the necessity of leaving the heir one shilling in order to cut him off effectually. The querela inofficiosi testamenti was a process by which a will formally valid could be either totally or partly upset at the instance of certain near relations on the ground that the claims of natural affection had been disregarded by the testator. The querela inofficiosi was not barred by any legacy, however slight, being left to such relation, but only by giving him one fourth of his intestate portion (§ 152, comm.; Sohm, § 113. For the changes which Justinian made in the law on this subject see Inst. 2, 18, 1, 2; Novella, 18, 1, and 115). Thus even a legacy left to an afterborn sua heres would be unavailing to save the will from being inofficiosum, unless it amounted to one fourth of her share by descent. If no legacy at all were left her, the will would be informal and absolutely void as against her, unless she was disinherited; if less than a fourth of her share were left, the will would not be absolutely void but voidable, i. e. liable to be altogether or in part overthrown if she chose to impeach it as inofficiosum.

§ 135. The Praeteritio of a descendant who is suus heres to the testator or, but for emancipation, would be suus heres, entitles the descendant to bonorum possessio. If the praeteritus is filius suus heres, the will is absolutely void and contra-tabular possession is an intestate succession: but if the praeteritus is emancipatus, the effect of contra-tabular possession is to divide the inheritance between the praeteritus and other descendants who were instituted heirs, excluding both instituted strangers and disinherited sui heredes.

Contra-tabular possession might be claimed either by the praeteritus himself, or by any of the instituted sui heredes. For if an instituted heir took less by his institution than he would by this partial intestacy, it would be his interest to claim contra-tabular possession, commisso per alium edicto, 'the edict having been brought into operation by another,' viz. by another descendant, who had been pretermitted.

The portions of the will that remained in force were:

(1) The exheredations: for such of the liberi as were duly disinherited continued, as was mentioned, excluded from the inheritance:

(2) The pupillary substitutions, the nature of which will hereafter (§ 179) be explained:

(3) Legacies given to certain conjunctae personae, e. g. legacies to ascendants or descendants of the testator, or a bequest to the wife of the dower which she had brought to her husband. If, instead of making the conjuncta persona a legatee, the testator had given his bounty in the form of a portion of the inheritance in which the conjuncta persona was instituted heir, such institution continued valid. The validity, however, of such legacies and institutions was by a constitution of Antoninus Pius, Dig. 37, 5, 7, and 8 pr. subjected to this limitation, that all the conjunctae personae together could not take more than a virilis portio, i. e. they were not entitled to more than fell to the lot of each contra-tabulant or claimant of contra-tabular possession; with this further proviso, that any conjuncta persona who is instituted heir of the inheritance in a portion of the heritage may retain as much thereof as he would have obtained by claiming contra-tabular possession, cf. Roby, vol. i, p. 250.

The partial intestacy produced by contra-tabular possession shows that the rule which we have already quoted, nemo pro parte testatus pro parte intestatus decedere potest, must be taken with some reservation. Although a testator cannot voluntarily dispose of only part of his heritage, such partial disposition may be introduced against the testator's intention by the operation of law. The significance of the rule is principally this: that if a testator only names for a certain fraction of the inheritance, or if the fraction in which one of several heirs is instituted lapses by his decease before the testator's death, the portion which was undisposed of or lapsed does not devolve, as it would in English law, to the heirs-at-law or persons entitled by intestacy, but goes by accrual (accretio) to those to whom the remainder of the inheritance is left.

QVIBVS MODIS TESTAMENTA INFIRMENTVR.

§ 138. Si quis post factum testamentum adoptauerit sibi filium aut per populum eum qui sui iuris est, aut per praetorem eum qui in potestate parentis fuerit, omni modo testamentum eius rumpitur quasi agnatione sui heredis.

Inst. 2, 17, 1.

§ 138. If after making his will a man adopts as son either a person sui juris by means of the people (in comitia) or one subject to the power of an ascendant by means of the Praetor, his will is inevitably revoked as it would be by the subsequent birth of a self-successor.

§ 139. Idem iuris est si cui post factum testamentum uxor in manum conueniat, uel quae in manu fuit nubat; nam eo

§ 139. The same happens if after making his will the testator receives a wife into his hand, or marries a person who is in his

modo filiae loco esse incipit et quasi sua.

§ 140. Nec prodest siue haec siue ille qui adoptatus est in eo testamento sit institutus institutaue; nam de exheredatione eius superuacuum uidetur quaerere, cum testamenti faciendi tempore suorum heredum numero non fuerit.

§ 141. Filius quoque qui ex prima secundaue mancipatione manumittitur, quia reuertitur in potestatem patriam, rumpit ante factum testamentum; nec prodest, ⟨si⟩ in eo testamento heres institutus uel exheredatus fuerit.

§ 142. Simile ius olim fuit in eius persona cuius nomine ex senatusconsulto erroris causa probatur, quia forte ex peregrina uel Latina quae per errorem quasi ciuis Romana uxor ducta esset natus esset; nam siue heres institutus esset a parente siue exheredatus, siue uiuo patre causa probata siue post mortem eius, omni modo quasi agnatione rumpebat testamentum.

§ 143. Nunc uero ex nouo senatusconsulto quod auctore diuo Hadriano factum est, siquidem uiuo patre causa probatur, aeque ut olim omni modo rumpit testamentum; si uero post mortem patris, praeteritus quidem rumpit testamentum, si uero heres in eo scriptus est uel exheredatus, non rumpit testamentum; ne scilicet diligenter facta testamenta rescinderentur eo tempore quo renouari non possent.

§ 144. Posteriore quoque

hand, as she thereby acquires the status of a daughter and becomes his self-successor.

§ 140. Nor does it avail to prevent the rupture that such a wife or adopted son was in that will instituted heir, for as to disinheriting them, not having been self-successors when the will was made, the question could not then have been material.

§ 141. So a son manumitted after the first or second sale reverts into the power of his father and revokes a previous will, nor does it avail that he is therein appointed heir or disinherited.

§ 142. The same rule formerly held of the son in whose behalf the decree of the senate allows proof of error, if he was born of an alien or Latin mother who was married in the mistaken belief that she was a Roman: for whether he was appointed heir by his father or disinherited, and whether the error was proved in his father's life or after his death, in every case the will was revoked as by the subsequent birth of a self-successor.

§ 143. Now, however, by a recent decree of the senate, made on the proposition of the late emperor Hadrian, if the father is alive when the error is proved, the old rule obtains and the will is in every case avoided; but when the error is proved after the father's death, if the son was passed over in silence, the will is revoked; but if he was appointed heir or disinherited the will is not revoked; in order that carefully executed wills should not be rescinded at a period when re-execution is impossible.

§ 144. A subsequent will duly

testamento quod iure fact*um* est superius rumpitur. nec interest an extiterit aliquis ex eo heres, an non extiterit; hoc enim solum spectatur, an existere potuerit. ideoque si quis ex posteriore testamento quod iure factum est aut noluerit heres esse, aut uiuo testatore aut post mortem eius antequam hereditatem adiret decesserit, aut per *cre*tionem exclusus fuerit, aut condicione sub qua heres i*n*stitutus est defectus sit, aut propter caelibatum ex lege *I*ulia summotus fuerit ab hereditate: quibus casibus pater familias intestatus moritur, nam et prius testamentum non ualet ruptum a posteriore, et posterius aeque nullas uires habet, cum ex eo nemo heres extiterit. Inst. 2, 17, 2.

executed is a revocation of a prior will, and it makes no difference whether an heir ever actually takes under it or no; the only question is, whether one might. Accordingly, whether the heir instituted in a subsequent will duly executed declines to be heir, or dies in the lifetime of the testator, or after his death before accepting the inheritance, or is excluded by expiration of the time allowed for deliberation, or by failure of the condition under which he was instituted, or by celibacy as the lex Julia provides; in all these cases the testator dies intestate, for the earlier will is revoked by the later one, and the later one is inoperative, since no one becomes heir under it.

§ 145. Alio quoque modo testamenta iure facta infirma*n*tur, uelut*i* ⟨*cum*⟩ is qui fecerit testamentum *c*apite deminut*us* sit; quod quibus modis accidat, primo commentario relatum est. Inst. 2, 17, 4.

§ 145. There is another event whereby a will duly executed may be invalidated, namely, the testator's undergoing a loss of status: how this may happen was explained in the preceding book.

§ 146. Hoc autem casu inrita fieri testamenta dicemus, cum alioquin et quae rumpunt*ur* inrita fiant, ⟨*et quae statim ab initio non iure fiunt inrita sint; sed et ea quae iure facta sunt et postea propter capitis deminutionem inrita fiunt*⟩ poss*unt* nihilo minus rupta dici. sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure fieri dicuntur, quaedam iure facta rumpi uel inrita fieri. Inst. 2, 17, 5.

§ 146. In this case the will may be said to be rescinded; for although both those wills that are revoked and those that are not from the first made in proper form may be said to be rescinded, and those that are made in proper form but subsequently annulled by loss of status may be said to be revoked, yet as it is convenient that different grounds of invalidity should have different names to distinguish them, we will say that some wills are not made in proper form, others made in proper form are either revoked or rescinded.

§ 138. A will may be void from the first because it is not duly

made—testamentum nullum, injustum, non jure factum—or it may be avoided by some subsequent circumstance—testamentum ruptum §§ 138, 144, irritum § 146, destitutum—or it may be upset as being unduteous—inofficiosum. A will is destitutum, 'cum ex eo nemo heres extiterit,' § 144. A will may be revoked or ruptured by a subsequent will, but not by a codicil. The tearing up or destruction of a will does not revoke it, unless this is done by the testator 'animo revocandi.' See § 151, comm. The innovations of Justinian changed the effects of adoption. Under his enactment, if a child is adopted by an ascendant the old rules obtain; but a person adopted by a stranger only acquires rights in the adoptive family in case of the adopter's intestacy, and therefore need not be instituted or disinherited by the adopter; he retains, however, his rights in his natural family, and therefore must be instituted or disinherited in the will of his natural parent. 1 §§ 97–107, comm.

§ 139. By English law the only circumstance by which a will is avoided (besides revocation, cancellation, execution of a later will) is the marriage of the testator, and this operates universally, irrespectively of the birth of children. Marriage without manus, which was usual in the time of Gaius, had no effect on a will.

§ 140. This was reversed before the time of Justinian, for we find in Dig. 28, 3, 18 that the institution of the future adoptive son saves a will from being ruptured by adoption. Indeed, considering that the object of the lex Vellaea was to save wills from rupture, we may be surprised that the extension of its provisions from the natural postumi to the artificial postumi or quasi postumi had not been established in the days of Gaius.

§ 141. Cf. 1 §§ 132–136.

§ 142. As to erroris causae probatio see 1 § 67.

BONORVM POSSESSIO SECVNDVM TABVLAS.

§ 147. Non tamen per omnia inutilia sunt ea testamenta quae uel ab initio non iure facta sunt uel iure facta postea inrita facta *aut* rupta sunt. nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et ciuis Romanus et suae potestatis mortis tempore fuerit. nam si ideo inritum *factum sit* testamentum, quod puta ciui-

§ 147. Wills are not altogether inoperative either when originally informal or when though at first made in proper form they were subsequently rescinded or revoked; for if the seals of seven witnesses are attached, the testamentary heir is entitled to demand possession in accordance with the will, if the testator was a citizen of Rome and sui juris at the time of his death; but if the cause of nullity was, say, the testator's loss of citizenship, or loss of liberty, or adoption and he dies subject

tatem uel etiam libertatem testator amisit, *aut is* in adoptionem se dedit ⟨*et*⟩ mortis te*m*pore in adoptiui patris potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem pet*er*e.
Inst. 2, 17, 4.

to his adoptive father's power, the heir instituted in the will is barred from demanding possession in accordance with the will.

§ 148. ⟨*Itaque qui*⟩ secundum tabulas testamenti quae aut statim ab initio non iure factae sint, aut iure factae postea *r*uptae uel inritae erunt, bonorum possessionem accipiunt, si modo possunt hereditatem optinere, habebunt bonorum possessionem cum re; si uero ab iis auocari hereditas potest, habebunt bonorum possessionem sine re.

§ 148. Persons granted possession in accordance with a will either originally not made in due form or originally made in due form and subsequently revoked or rescinded, have, if only they can maintain their right to the inheritance, effective possession of it (bonorum possessio cum re); but if they can be deprived of the property by an adverse claimant, the grant of possession to them is ineffective (bonorum possessio sine re).

§ 149. Nam si quis heres iure ciuili institutus sit uel ex primo uel ex posteriore testamento, uel ab intestato iure legitimo heres sit, is potest ab iis hereditatem auocare; si uero nemo sit alius iure ciuili heres, ipsi retinere hereditatem possunt, nec ullum ius aduersus eos habent cognati *qui* legitimo iure deficiuntur.

§ 149. For an heir instituted according to jus civile either by an earlier or later will, or a statutory heir by intestacy, can evict the mere bonorum possessor according to the will from the inheritance; but in default of such claim on the part of a civil heir, such possessor according to the will can retain the inheritance, and cannot be deprived of it by cognates, these having no civil title.

§ 149 *a*. Aliq*uando tamen*, *sicut su*pra | quoque notauimus, etiam legitim*is heredibus* | potior*es* scripti habentur, u*eluti* si ideo n*on iure* | factum sit testamentum, quod familia non uenierit aut nun|cupationis uerba testator locutus non sit; ——|—— *ag*nati petant hereditatem ——| ex con*stitutione*

§ 149 *a*. Sometimes, however, an heir with a civil title is postponed to an irregularly appointed heir; for instance, if the irregularity was only the absence of mancipation or nuncupatory publication, since if the agnates of the deceased claim the inheritance, they may be repelled by the plea of fraud, according to the constitution of the Emperor Antoninus.

§ 150. ——|ueri——le*ge* Iulia——| possessores—— e|a lege bona caduca fiunt et ad populum deferri | iubentur, si defuncto nemo——.

§ 150. Possession according to the will is not defeated by the lex Julia, under which law a condition of caducity or devolution to the fiscus is the absence of every kind of heir, whether civil or praetorian.

§ 151. | Potest ut iure facta testamenta *contraria uoluntate* | infirme*n*tur. apparet ⟨*autem*⟩ non posse *ex eo s*olo i*nfirma*|ri testamentum, quod postea testator id noluerit ualere, usque adeo ut si linum eius inciderit, nihilo minus iure ciuili ualeat. quin etiam si deleuerit quoque a*ut* conbuss*erit* tabulas testamenti, ni*hilo* minus ⟨*non*⟩ desinent ualere *quae* ibi fuerunt scripta, licet eorum probatio diffi*cilis* sit.

§ 151. A validly executed will may be invalidated by a contrary expression of will: but a will is not, it is clear, invalidated by the mere intention of revocation. And consequently, in spite of the testator's cutting the strings by which it is tied, it nevertheless, at civil law, continues valid: and his erasure or burning of the dispositions does not render them invalid, though it makes them difficult of proof.

§ 151 *a*. Quid ergo est? si quis ab intestato bonorum possessionem petierit *et* is .| qui ex eo testamento heres *est* petat h*eredi*t*atem*,——|——|—— perueniat hereditas; et hoc ita *re*scripto imperatoris Antonini significatur.

§ 151 *a*. What then is the result? If a claimant demand bonorum possessio by intestacy, and a testamentary heir under such circumstances demand the civil inheritance under the will, the latter is repelled by the plea of fraud: and if no one should demand bonorum possessio by title of intestacy, the testamentary heir is superseded by the fiscus as unworthy of the succession in order to carry the testator's intention of excluding him into effect: and this was enacted by a rescript of the Emperor (Marcus Aurelius) Antoninus.

§ 147. The validity of a testament implies, strictly speaking, the continuance of a testator's intention, and therefore of his capacity of intention (testamenti factio), from its first declaration to the moment of his death. Accordingly an intermediate capitis diminutio avoided the will invalid (irritum) at civil law, § 146. The praetor, however, only looked at the first and last moments, and, if at these periods the testator had testamenti factio, sustained his intentions by granting possession according to the will, although he had undergone capitis diminutio minima in the intervening period.

So at civil law a will was revoked (ruptum) by after-birth (agnatio) of a self-successor, § 138; but if he died before the testator, the praetor sustained the will by granting possession according to the will to the heir instituted in it. Dig. 28, 3, 12 pr. Postumus praeteritus, vivo testatore natus, decessit: licet juris scrupulositate nimiaque subtilitate testamentum ruptum videatur, attamen si

signatum fuerit testamentum, bonorum possessionem secundum tabulas accipere heres scriptus potest, remque obtinebit, ut et divus Hadrianus et Imperator noster rescripserunt. In order that possession in accordance with the will, granted when a will had been avoided (irritum) by intervening loss of capacity, might be efficacious (cum re), i. e. not defeasible by the claimant entitled at civil law by intestacy, it was necessary that the testator on reacquiring capacity should confirm his will by a codicil or other writing (codicillis aut aliis litteris), Dig. 37, 11, 11, 2.

§ 148. There was no ipso jure, or necessarius, bonorum possessor, corresponding to the heres necessarius, § 152, with whom delatio and adquisitio hereditatis were coincident: all bonorum possessores corresponded to the other class of heres, the heres extraneus or voluntarius, with whom adquisitio was distinct from delatio hereditatis, and required a voluntary act (aditio). That is to say, the person called (vocatus) by the praetorian edict to the succession forfeited his right to succeed unless he made his claim (agnitio, petitio, admissio bonorum possessionis) within a certain period, for ascendants and descendants a year, for others 100 dies utiles from the date of the vocatio (delatio). On the claim under the edict being made, the grant (datio) of bonorum possessio followed as a matter of course without any judicial investigation (causae cognitio). It was a mere formality, a certificate of the magistrate, the praetor or praeses provinciae, that the agnitio had been made within the allotted period, before the expiration of the term allowed for deliberation. If any real controversy arose, it was decided by one of two actions, hereditatis petitio, or the Interdict Quorum bonorum. If the claimant relied on his title at civil law, he sued by hereditatis petitio; if he relied on the title given him by the praetorian edict, he sued by the Interdict Quorum bonorum. See 4 § 144. If defeated in either of these proceedings, he gained nothing by having obtained the formal grant of praetorian succession—he had only bonorum possessio sine re.

§ 149 *a*. A praetorian title was, as a general rule, sine re, if a civil title was opposed to it, but the constitution of the Antonine emperor, probably Marcus Aurelius, mentioned here and in § 120, made an important inroad on this principle.

§ 150. Originally when a heritage was vacant from the failure of intestate successors, Ulpian 28, 7, or from the neglect of an heir to enter upon it, § 52, any stranger might take possession and acquire by usucapio, but this right was rendered ineffectual by Hadrian's Senatusconsultum, § 57. The lex Julia de Maritandis ordinibus, which is the statute here referred to, was passed A. D. 4; for an account of its purport and of the meaning of the term caduca see § 190 and § 206,

comm. Besides its rights to caduca under this statute the public treasury or that of the Emperor could claim all inheritances left without an heir (bona vacantia). The state did not become necessary successor (ipso jure) but had the delatio (ad populum deferri jubentur), i.e. had the right of deliberation and acceptance or repudiation, Inst. 3, 11, 1. As universal successor the state could recover from the unentitled occupant by Hereditatis petitio, Dig. 5, 3, 20, 7, and could transfer its rights to a purchaser, as if the transfer were made under the Sc. Trebellianum, l. c. 54 pr. (cf. § 253).

The treasury was bound to pay all codicillary legacies and trusts: and succeeded to all the obligations active and passive, in other words, to all the personal rights and personal duties, of the heritage-leaver: but like other successors in later times, under the law of Justinian, might, by taking advantage of the Benefice of inventory, confine its liability to the extent of the assets, §§ 158-162, comm. In the event of the repudiation of the succession by the Fiscus, the goods were sold for the benefit of creditors. Vangerow, § 564.

Gaius probably here means, though the MS is defective, that although a grant of bonorum possessio might be rendered ineffective (sine re) in consequence of the superior claims of a person with a civil title by whom the possessor could be evicted, the fiscus had no title to an inheritance under the lex Julia, if the deceased, though without a civil successor, had left a bonorum possessor. (Cf. note on § 150 in Muirhead's Gaius.)

§ 151. The Rupture (ruptio) of a will was produced by two circumstances: (1) Agnatio postumi, the subsequent birth of a self-successor, or the coming into existence of a quasi postumus, § 139: and (2) Revocation, §§ 138-146, comm. On the principle, Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est (Dig. 50, 17, 35), the most formal and originally the only mode of revoking a will would be the execution of a subsequent will. Another mode of Revocation sanctioned by Justinian depended on two conditions: a declaration attested by three witnesses or made in the form of a record or protocol deposited in the archives of a court, and the expiration of ten years from the date of the execution of the will, Cod. 6, 23, 27.

The mere cancellation or obliteration of a will, with the intention of revoking it, was an informal Revocation and left the will valid at civil law: the will, however, was not allowed to hold good against this evidence of the testator's change of intention. The rescript of Marcus Aurelius A. D. 166 to this effect, to which Gaius alludes § 151 *a*, is preserved in the Digest, 28, 4, 3.

Justinian ordained that a will should be perfectly revoked and completely avoided by the cutting of the cords, or removal of the

seals, or other intentional destruction of the outward signs of its due solemnization, Cod. 6, 23, 30. English law, as laid down in 1 Vict. c. 26 § 20 and interpreted in the celebrated case of Lord St. Leonards, L. R. 1 P. D. 154, seems to be in conformity with Roman law on the subject of unintentional erasure or destruction of a will.

§ 151 *a*. Ereption for indignitas, an institution which survived in the legislation of Justinian, Dig. 34, 9, Cod. 6, 35, must be distinguished from the lapse of a testamentary disposition under the lex Julia (caducum), §§ 185–190, comm. In the latter case there was want of capacitas, as opposed to want of testamenti factio passiva, on the part of honoratus. In the case of the indignus there was not even incapacitas but only liability to deprivation. Some grounds of Ereption were common to the heir and legatee, others peculiar to the heir, others peculiar to the legatee. The forfeiture of the inheritance or legacy was sometimes in favour of the Fiscus, sometimes in favour of other persons, usually of those who would have taken but for the disposition in favour of indignus.

Instances of grounds for which either heir or legatee forfeited their interest to the Fiscus were: undertaking a secret unlawful trust, coercion of the testator in respect of his will, killing the testator or neglect to avenge his death, wrongful impeachment of his will for inofficiositas, &c.

Grounds for which their shares were forfeited to other persons than the Fiscus were: refusal of the office of guardian when the prospect of the discharge of this duty was the motive of the testator's bounty, refusal to undertake the education of an infant child of the testator, neglect of the testator's burial, &c.

Grounds on which the heir alone forfeited the whole or part of his inheritance to the Fiscus were: concealment of a portion of the hereditaments in order to defraud a legatee (whereupon the heir forfeited the fourth which he was entitled to retain from such legacy by the lex Falcidia), the discovery that though putative son he was not a genuine son of the testator, the deliberate cancellation of his name by the testator, the imperfect execution of a subsequent will in which he was excluded from the heritage, a codicillary declaration of his unworthiness to inherit, &c.

Grounds on which an heir forfeited his portion to persons other than the Fiscus were: neglect on the part of a mother to demand a guardian for her infant child, a second marriage by a mother who herself is guardian before she has caused another guardian to be substituted, neglect of a lunatic testator, neglect to ransom the testator, criminal prosecution of testator, &c.

Grounds exclusively affecting a legatee and that in favour of the heir are theft from the heritage and concealment of the testator's will.

DE HEREDVM QVALITATE ET DIFFERENTIA.

§ 152. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

Inst. 2, 19 pr.

§ 153. Necessarius heres est seruus cum libertate heres institutus, ideo sic appellatus, quia siue uelit siue nolit, omni modo post mortem testatoris protinus liber et heres est.

Inst. 2, 19, 1.

§ 154. Vnde qui facultates suas suspectas habet, solet seruum suum primo aut secundo uel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona ueneant, id est ut ignominia quae accidit ex uenditione bonorum hunc potius heredem quam ipsum testatorem contingat; quamquam apud Fufidium Sabino placeat eximendum eum esse ignominia, quia non suo uitio sed necessitate iuris bonorum uenditionem pateretur; sed alio iure utimur. Inst. l. c.

§ 155. Pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroni sibi adquisierit, siue ante bonorum uenditionem siue postea, ipsi reseruentur; et quamuis pro portione bona uenierint, iterum ex hereditaria causa bona eius non uenient, nisi si quid ei ex hereditaria causa fuerit adquisitum, uelut si † Latinus adquisierit, locupletior factus sit; cum ceterorum hominum quorum bona uenierint pro portione, si quid

§ 152. Heirs are either necessary successors or necessary self-successors or external successors.

§ 153. A necessary successor is a slave instituted heir with freedom annexed, so called because, willing or unwilling, without any alternative, on the death of the testator he immediately has his freedom and the succession.

§ 154. For when a man's affairs are embarrassed, it is common for his slave, either in the first place (institutio) or as a substitute in the second or any inferior place (substitutio), to be enfranchised and appointed heir, so that, if the creditors are not paid in full, the property may be sold rather as belonging to this heir than to the testator, the ignominy of insolvency thus attaching to the heir instead of to the testator; though, as Fufidius relates, Sabinus held that he ought to be exempted from ignominy, as it is not his own fault, but legal compulsion, that makes him insolvent; this, however, is not in our view the law.

§ 155. To compensate this disadvantage he has the advantage that his acquisitions after the death of his patron, and whether before or after the sale, are kept apart for his own benefit, and although a portion only of the debts is satisfied by the sale, he is not liable to a second sale of his after-acquired property for the debts of the testator, unless he gain anything in his capacity as heir, as if he inherit the property of a Latinus Junianus [another freedman of the testator]; whereas other persons, who only pay a dividend,

postea adquirant, etiam saepius eorum bona uen*ire* solent.

Inst. l. c.

on subsequently acquiring any property, are liable to subsequent sales again and again.

§ 156. Sui autem *e*t necessarii heredes sunt uelut filius filiaue, nepos neptisue ex filio, ⟨*et*⟩ deinceps ce*te*ri qui modo in potestate morientis fuerunt. sed uti nepos neptisue su*us* heres sit, non sufficit eum in potestate aui mortis tempore fuisse, sed opus est ut pater quoque eius uiuo patre suo desierit suus heres esse aut morte interceptus aut qualibet ratione liberatus potestate; tum enim nepos neptisue in locum sui patris succedunt.

Inst. 2, 19, 2.

§ 156. Sui et necessarii heredes are such as a son or daughter, a grandson or granddaughter by the son, and further lineal descendants, provided that they were under the power of the ancestor when he died. To make a grandson or granddaughter self-successor it is, however, not sufficient that they were in the power of the grandfather at the time of his death, but it is further requisite that their father in the life of the grandfather shall have ceased to be self-successor, whether by death or by any mode of liberation from parental power, as the grandson and granddaughter then succeed to the place of the father.

§ 157. Sed sui quidem heredes ideo appellantur, quia do*m*estici heredes sunt et uiuo quoque parente quoda*m*modo domini existimantur; unde etiam si quis intestatus mort*u*us sit, prima causa est in successione liberorum. necessarii uero ideo dicuntur, quia omni modo, ⟨*siue*⟩ uelint *s*iue ⟨*nolint, tam*⟩ ab intestato quam ex testa*mento* heredes fiunt. Inst. l. c.

§ 157. They are called sui heredes because they are family heirs, and even in the lifetime of the parent are deemed to a certain extent co-proprietors; wherefore in intestacy the first right of succession belongs to the children. They are called necessary, because they have no alternative, but, willing or unwilling, both in testacy and intestacy, they become heirs.

§ 158. Sed his praetor permittit abstinere se ab heredi*tate*, ut potius parentis bona ueneant. Inst. l. c.

§ 158. The praetor, however, permits them to abstain from the succession, and leave the estate of the ancestor to be sold as an insolvent one.

§ 159. Idem iuris est et ⟨*in*⟩ uxoris persona quae in manu est, quia filiae loco est, et in nuru quae in manu filii est, quia neptis loco est.

§ 159. The same rule governs a wife in the hand of a husband, for she is on the footing of a daughter, and a son's wife in the hand of the son, for she is on the footing of a granddaughter.

§ 160. Quin etiam similiter abstinendi po*tes*ta*t*em facit praetor etiam ei qui in causa

§ 160. A similar power of abstention is granted by the praetor to a person held in mancipium when

mancipii est, ⟨*si*⟩ cum liber*tate* heres institutus sit, *quamuis* necessarius, non etiam suus heres sit, tamquam seruus.

instituted heir with freedom annexed, although he is simply a necessary successor and not also a self-successor, mancipation being assimilated to servitude.

§ 161. Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantur. itaque liberi quoque nostri qui in potestate nostra non sunt here*des* a nobis instituti [sicut] extranei uidentur. qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent. serui quoque qui cum liber*tate* heredes instituti sunt et postea a domino manumissi, eodem numero habentur. Inst. 2, 19. 3.

§ 161. Those who were not subject to the testator's power are called strangers, or external heirs. Thus children not in our power, if instituted heirs, are deemed strangers; and for the same reason children instituted by their mother belong to this class, because women are not invested with power over their children. Slaves instituted heirs with freedom annexed, and subsequently manumitted, belong to the same class.

§ 162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate uel non adeunda. Inst. 2, 19, 5.

§ 162. External heirs have the right of deliberating whether they will or will not enter on an inheritance.

§ 163. Sed siue is cui abstinendi potestas est inmiscuerit se bonis hereditariis, siue is cui de adeunda ⟨*hereditate*⟩ deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum XXV. nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem diuum Hadrianum etiam maiori XXV annorum ueniam dedisse, cum post aditam hereditatem grande aes alienum quod aditae hereditatis tempore latebat apparuisset. Inst. 1. c., and 6.

§ 163. But if either a person who has the power of abstention or a person who has the power of deliberation as to his acceptance of the inheritance, interferes with the property belonging to the inheritance, he has no longer the right of relinquishing the inheritance, unless he is a minor under twenty-five years of age; for minors, both when they take any other injudicious step, and when they incautiously accept a disadvantageous inheritance, obtain relief from the praetor. The late Emperor Hadrian even relieved a person who had attained his majority, when, after his acceptance of an inheritance, a great debt, unknown at the time of acceptance, had come to light.

§ 164. Extraneis heredibus solet cretio dari, id est finis deliberandi, ut intra certum tempus uel adeant hereditatem,

§ 164. External heirs are commonly given by the will a prescribed term for decision (cretio), that is, a definite delay for deliberation, within which time they

uel si non adeant, temporis fine summoueantur. ideo autem cretio appellata est, quia cernere est quasi decernere et constituere.

must formally accept, and in default of formal acceptance are barred. Cretio is so called because the word cernere is equivalent to decernere, that is, to come to a determination and resolution.

§ 165. Cum ergo ita scriptum sit HERES TITIVS ESTO, adicere debemus CERNITOQVE IN CENTVM DIEBVS PROXIMIS QVIBVS SCIES POTERISQVE. QVODNI ITA CREVERIS, EXHERES ESTO.

§ 165. Accordingly, after the words, 'Titius, be thou my heir,' we ought to add, 'and formally declare thy acceptance within a hundred days in which thou knowest of thy institution and hast power to declare whether thou accept; or in default of so declaring be thou disinherited.'

§ 166. Et qui ita heres institutus est, si uelit heres esse, debebit intra diem cretionis cernere, id est haec uerba dicere QVOD ME P. *MEVIVS* TESTAMENTO SVO HEREDEM INSTITVIT, EAM HEREDITATEM ADEO CERNOQVE. quodsi ita non creuerit, finito tempore cretionis excluditur; nec quicquam proficit, si pro herede gerat, id est si rebus hereditariis tamquam heres utatur. Inst. 2, 19, 7.

§ 166. And the heir thus appointed, if he wish to inherit, must within the term prescribed solemnly declare his decision in the following words: 'Whereas Publius Mevius in his will has made me his heir, that inheritance I hereby accept and adjudge to myself.' In default of such formal declaration, the elapsing of the period allowed shuts him out from the inheritance, and it is of no avail that he behave as heir, that is, deal with the estate of the deceased as if he were heir.

§ 167. At is qui sine cretione heres insti*tu*tus sit, aut qui ab intestato legitimo iure ad hereditatem uocatur, pote*st* aut cernendo aut pro herede gerendo uel etiam nuda uoluntate suscipiendae hereditatis heres fieri; eique liberum est quocumque tempore uoluerit, adire hereditatem; ⟨*sed*⟩ solet praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si uel*it* ade*at* hereditatem, si minus, ut liceat creditoribus bona defuncti uendere.

§ 167. In the absence of a prescribed term for deliberation in the case of testamentary succession, and in the case of a statutory right of succession on intestacy, a man takes the inheritance either by formal declaration, or by behaving as heir, or by informal declaration, and is not barred from accepting by any lapse of time; but it is usual for the praetor, at the demand of the creditors of the deceased, to appoint a period, on the expiration of which without his acceptance the creditors are permitted to put up the estate of the deceased for sale.

§ 168. Sic*ut* autem ⟨*qui*⟩ cum cretione heres institutus est, nisi creuerit hereditatem, non fit heres, ita non aliter ex-

§ 168. But just as a person who is instituted heir subject to a prescribed term for decision does not actually become heir

cluditur, quam si non creuerit intra id tempus quo cretio finita *est*; itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse potest.

unless he makes a formal declaration of his acceptance, so the only way he is excluded from the inheritance is by his not thus declaring within the last day of the appointed term; and though, pending the term, he may have made up his mind to disclaim, yet if he change his mind before the time is expired and formally declare his acceptance, he can become heir.

§ 169. At is qui sine cretione heres institutus est, qui*ue* ab intestato per legem uocatur, sicut uoluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.

§ 169. If no term is prescribed in the institution, or in the case of a statutory right of succession on intestacy, just as an informal declaration makes him heir, so the contrary declaration immediately bars him from the succession.

§ 170. Omnis autem cretio certo tempore constringitur. in quam rem tolerabile tempus uisum est centum dierum. potest tamen nihilo minus iure ciuili aut longius aut breuius tempus dari; longius tamen in*t*erdum praetor coartat.

§ 170. Every prescribed term of deliberation has a certain limit, and a reasonable limit is held to be a hundred days, yet by the civil law a longer or shorter period is allowed to be fixed, though a longer period is sometimes shortened by the praetor.

§ 171. Et quamuis omnis cretio certis diebus constringatur, tamen alia cretio uulgaris uocatur, alia certorum dierum: uulgaris illa, quam supra exposuimus, id est in qua *ad*ic*i*untur haec uerba QVIBVS SCIET POTERITQVE; certorum dierum, in qua detractis his uerbis cetera scribuntur.

§ 171. Although, however, the time of deliberation is always limited to certain days, yet one mode of limitation is called ordinary, the other determinate; the ordinary being that above indicated, namely, with the addition of the words 'in which he knows and is able'; determinate that in which these words are omitted.

§ 172. Quarum cretionum magna differentia est. nam uulgari cretione data nulli dies conputantur, nisi quibus scierit quisque se heredem esse institutum et possit cernere. certorum uero dierum cretio*ne* data etiam nescient*i* se heredem institutum esse numerantur dies continui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei

§ 172. These modes are very different in effect, for when the ordinary period is allowed, the only days computed are those on which he knows of his institution and is in a position to decide, but when a determinate period is allowed, notwithstanding the heir's want of knowledge of his institution, the days begin to be counted continuously; and so notwithstanding his inability from any cause to declare, or any con-

qui sub condicione heres *insti*tutus est, tempus numeratur; unde melius et aptius est uulgari cretione uti.

dition annexed to his institution, nevertheless the days begin to be reckoned. Accordingly, it is better and more convenient to employ the ordinary mode of limitation.

§ 173. Continua haec cretio uocatur, quia continui dies numerantur. sed quia [tamen] dura est h*ae*c cretio, altera in us*u* habetur; unde etiam uulgaris dicta est.

§ 173. The determinate period is called continuous, because the days are reckoned continuously. On account of the harshness of this condition the other is commonly employed, and hence is called ordinary.

§ 152. The rules of institution and disinheritance were formal restrictions on the unlimited power of testamentary disposition, which was conferred by the terms of the Twelve Tables; § 102, comm. The general tendency and purpose of these restrictions are to protect children against the caprice of parents, and to be fully comprehended they should be viewed in connexion with the rules respecting testamentum inofficiosum, which were not simply formal but real restrictions of testamentary freedom. These limitations of testamentary power may be considered as consequences of the Roman conception of family duty. An English testator has unlimited power to dispose of his property, and natural feeling is supposed to be a sufficient guaranty that none of his children will be left without suitable provision. Of Roman testators Justinian says: Inst. 2, 18 pr. Plerumque parentes sine causa liberos suos vel exheredant vel omittunt. The grounds on account of which parents may disinherit children, and children parents, are stated by Justinian in his 115th Nov., where the law on the subject of disinherison is consolidated and amended. They had to be mentioned in the will, and it was open to the disinherited person to show that they were unfounded. It is to be noticed that foreign systems of law, following the Roman example, generally restrict the father's power of disinherison. Cf. Sohm, § 113. The principal impediments to or restrictions on testamentary freedom in the history of Roman law may be distinguished as follows:—

(1) We have seen, § 123, that a suus heres must either be instituted or disinherited, a rule which the praetor extended to an emancipated child, § 135. This secured him against being simply forgotten.

(2) If a child was disinherited without a cause, or received less than one fourth, either as heir or legatee, of what his share would have been by intestate descent (portio legitima), he could by impeaching the will as immoral or unnatural (querela inofficiosi testamenti) have it set aside on the fictitious presumption of the testator's insanity. The presumption, at least, was so far fictitious that it was not allowed to

be rebutted by any other proof of his sanity except proof of the adequacy of the motives for which the child was disinherited. The querela inofficiosi was a form of petitio hereditatis, that is, a real action, and fell under the jurisdiction of the centumviral court, 4 § 31. Cf. Pliny, Ep. 5, 1; 6, 33. The amount of the share which must be left to a child to save a will from avoidance for inofficiositas bears some analogy to a requirement of the lex Falcidia, for it is identical with the amount which that law secures to the child or any one else when instituted heir as against the claims of legatees. The querela inofficiosi could not only be brought by a child but also by certain other near relatives, namely, parents, and by brothers and sisters, but by the last only if a turpis persona was instituted. Children and other near relations, even though emancipated, might be entitled to this remedy. See Inst. 2, 18; Dig. 5. 2; Cod. 3, 28.

(3) Although a child (or any one else) were instituted heir, yet the institution might be made illusory by the exhaustion of the whole inheritance in legacies, leaving nothing to the heir but the burden of administration. To meet this, the lex Falcidia provided that when more than three fourths of an inheritance is absorbed in legacies, all the legacies should abate proportionably so as to leave the heir a clear fourth of the portion in which he was instituted (quarta Falcidia), § 227.

(4) The senatus consultum Pegasianum provided in the same way against the inheritance being similarly exhausted by fideicommissa, § 254.

We may add that an impubes adopted by adrogation, if disinherited or without cause emancipated, was entitled to one fourth of the inheritance of his adoptive father (quarta Antonini), 1 § 102; Inst. 1, 11, 3.

§ 154. Primo aut secundo vel etiam ulteriore gradu, for an account of substitutio see § 174, &c.

§ 155. Velut si Latinus, cf. § 195 and 3 § 58; and for an explanation of the idiom see note to this passage in Muirhead's Gaius.

§ 157. Communism or co-ownership appears to be an older institution than divided or individual ownership. Even after the rights of the paterfamilias had been enormously developed at the expense of the rest of the household, as may have been the case in prehistoric times, a vestige of the times when property vested rather in the family than in the chief was perhaps preserved in the rules respecting the suus heres. Suus heres appears equivalent to sibi heres, and implies that he who now enters on proprietary rights in the character of paterfamilias had already possessed proprietary rights over the same subject-matter in the character of filiusfamilias.

Less barbarous than self-successor (the term chosen to represent suus heres as expressing sibi heres) but too long for perpetual use, would have been the circumlocution, immediate lineal successor.

Suus heres is a lineal descendant as opposed to the legitimus heres or nearest agnate, who is a collateral relation, on whom the inheritance devolves by the lex duodecim Tabularum in case there are no sui: and he is an immediate heir as opposed to an eventual heir. For instance, a grandson by an unemancipated son is in the grandfather's power, and may eventually be his heir, but is not his suus heres during the life of the son.

§§ 158–162. After acquiring an inheritance the heir became personally liable to the testator's creditors for the full amount of the testator's debts. But to relieve sui et necessarii heredes from being thus compulsorily burdened, the beneficium abstinendi was given them, § 158. The praetor could not, indeed, unmake, any more than he could make, a heres, but by his control over procedure he could put a person who had a civil title in the same position as if he had none, while, on the other hand, he regarded persons, having no civil title to the inheritance, as if they were heredes.

Adquisitio hereditatis by an external or voluntary heres may probably have required at first in all cases a formal act (cretio); but acting the part of heres (pro herede gerere), however informally, came to be recognized as equivalent in legal effect to a formal declaration, unless an institution was expressly made 'cum cretione.' The object of instituting an heir 'cum cretione' was to oblige him to accept or abandon the inheritance within a prescribed term. For otherwise the law allowed him to postpone his decision indefinitely, § 167.

It was to get rid of the inconvenience caused by leaving the inheritance open for a long period, that the praetor at the request of creditors of the estate fixed a period, generally a hundred days (tempus deliberandi), after which he authorized the sale of the property, § 167. When it became customary for the praetor to prescribe this time for deliberation, the formularies of cretio had no intelligible policy and were regarded as irksome. After being dispensed with in certain cases by other emperors, they were totally abrogated by Arcadius and Theodosius, A.D. 407. Cod. 6, 30, 17 Cretionum scrupulosam sollennitatem hac lege penitus amputari decernimus. 'Solemn declaration with its embarrassing formalities is hereby decreed to be absolutely abolished.' (For allusions to cretio by Cicero see Roby, Roman Law, 1, p. 396 and App. Bk. III.) For the repudiation of an inheritance by a voluntary heir no solemn form was at any time in use, and perhaps such repudiation was not legally recognized in early law, though it was possible for the heres to assign his right by in jure cessio. Thus an inheritance could not be lost any more than it could be acquired by a mere expression of intention, and it has been suggested that the abeyance of inheritances on this account was a cause which gave rise to bonorum possessio. In the

time of Gaius, however, a heres could on delatio reject an inheritance by any informal act expressive of his intention, and the acceptance or rejection of an inheritance once made was irrevocable. § 169.

To afford an escape from the danger of accepting inheritances more onerous than lucrative Justinian introduced the beneficium Inventarii, or privilege of making an inventory, reducing the liability of an heir who made the required inventory to the extent of the assets that came to his hands. The inventory must be commenced within thirty days from notice of the inheritance and completed in sixty other days. It must be executed in the presence of a notary (tabellarius) and the persons interested or three witnesses, Inst. 2, 19, 6; Cod. 6, 30, 22.

By English law the executor in every case is bound to make an inventory, and in no case is he answerable to the testator's creditors beyond the assets that come to his hands, unless for a sufficient consideration he make his own estate chargeable by a written engagement, as provided by the Statute of Frauds.

§§ 164–173. When a right is extinguished by inactivity prolonged for a certain period, as in the case of a heres after delatio who has omitted to make cretio within the time prescribed, the period has two modes of measurement: either every day is counted, and then the period is called tempus continuum; or only available days, days on which activity is possible, are counted, and then the period is called tempus utile. When a general rule prescribes a term, not greater than a year, within which certain steps must be taken before a court or judicial authority, on pain of forfeiting certain rights, such a term must be measured as tempus utile. Such are the rules requiring certain suits to be instituted within a year from their nativity, that is, limiting a year for their period of prescription; and the rule requiring the demand of the possession of a heritage (agnitio bonorum possessionis), whether testate or intestate, to be made, if the claimant is an ascendant or descendant, within a year; if he is a stranger, within a hundred days. The demand was made in writing, addressed to a competent magistrate, and was followed by an immediate grant de plano in the form of a simple subscriptio, Do bonorum possessionem. Kuntze, 856. When the step required is rendered impossible, not by a permanent obstacle, such as infancy, lunacy, prodigality, or juristic personality, but by some transitory circumstance, the days on which the action is hindered are excluded from the computation of the term.

Such hindrance (1) may relate to the person entitled, and then will be his captivity, or his absence on public service, or his detention by weather or illness, coupled with inability to appoint a procurator:

(2) Or, in the case of the limitation of actions, it may relate to the person of the defendant: if, for instance, he is unknown, or concealed, or absent and undefended:

(3) Or it may consist in the absence of the praetor from the court. Such absence might be accidental, or it might arise from the regular intermission of the dies juridici, or days on which the praetor performed his judicial functions, § 279, comm. As in the time of Marcus Aurelius such days only amounted to 230 in a year (Suetonius, Octavianus, 32), this cause alone would make annus utilis equivalent to about 1½ ordinary years. The intermission of dies juridici was doubtless the principal cause of a claimant's inability to perform an act in court on certain days; but in Roman law, as in modern times it was administered in Germany, when much of the procedure in an action had come to consist in delivery of writings at the office of a court, irrespectively of its session days and vacations, this cause lost its importance.

Knowledge (scientia) of the fact that he is entitled is not necessarily requisite on the part of the person entitled: in other words, his ignorance is not always sufficient to exclude a day from the number of dies utiles. The prescription of an action, when it is accomplished in annus utilis, begins to run from its nativity (actio nata), irrespectively of the plaintiff's knowledge of his right to sue. Ignorance of a right of action is generally the effect of Negligence, and therefore undeserving of relief, and might be protracted for an indefinite period. On the contrary, ignorance is sometimes a condition that delays the commencement of tempus continuum: for instance, the 50 dies continui allowed to a person for stating the grounds on which he was entitled to be excused from accepting a guardianship only began to run when he had notice of his nomination, Inst. 1, 25, 16: which shows that scientia and ignorantia have no necessary relation to the distinction of dies utiles and dies continui.

In the demand (agnitio) of bonorum possessio, however, by the claimant of a testate or intestate succession, the edict expressly made the scientia as well as the potestas of the claimant a condition of dies utilis, Dig. 38, 15, 2. Indeed the aditio of an inheritance was not possible unless made with a knowledge of the fact of the delatio and of its nature, whether testacy or intestacy. Moreover the ignorance of his rights could not be ascribed to the negligence of the person entitled, nor was it likely to be indefinitely protracted, as it would be the interest of the person next entitled to give him notice of the delation. Knowledge will generally only affect the beginning of a term, and the person who is once made aware of the delation of an inheritance will usually continue aware: but it is possible that a period of error should supervene; for instance, that, after an agnate has notice that he is entitled by intestacy and after his term for acceptance has commenced to run, a forged will should be produced and obtain credit: in which case the dies utiles would not continue to run until the forgery of the will was ascertained. Savigny, § 189.

The testamentary clause allowing a term for cretio vulgaris in contrast to cretio continua, like the edict relating to bonorum possessio, made scientia as well as potestas a condition of tempus utile.

As we have seen no time was prescribed by law for the aditio of the civil inheritance, § 167: for the acquisition (agnitio) of the praetorian succession we have seen that for ascendants and descendants a year, for others a hundred days was prescribed, Inst. 3, 9, 9. Agnitio and Repudiatio could be made by a procurator or agent, Dig. 37, 1, 3, 7: not so Aditio, Dig. 29, 2, 90, and still less Cretio.

§ 174. [DE SVBSTITVTIONIBVS.] *I*nterdum duos pluresue gradus heredum facimus, hoc modo L. TITIVS HERES ESTO CERNITOQVE IN DIEBVS ⟨*CENTVM*⟩ PROXIMIS QVIBVS SCIES POTERISQVE. QVODNI ITA CREVERIS, EXHERES ESTO. TVM MEVIVS HERES ESTO CERNITOQVE IN DIEBVS CENTVM et reliqua. et deinceps in quantum uelimus substituere possumus.

Inst. 2, 15 pr.

§ 174. Sometimes two or more degrees of heirs are instituted, as follows: 'Lucius Titius, be thou my heir, and declare solemnly within a hundred days after you know and are able: or, in default of so declaring, be disinherited. Thereupon, be thou, Mevius, my heir, and solemnly declare within a hundred days,' &c.; and in this way we can make as many substitutions as we like.

§ 175. Et licet nobis uel unum in *u*nius locum substituere pluresue, et contra in plurium locum uel unum uel plures substituere. Inst. 2, 15, 1.

§ 175. We may substitute in place of one either one or several, and, conversely, in the place of several we may substitute either several or one.

§ 176. Primo itaque gradu scriptus heres hereditatem cernendo fit heres et substitutus excluditur; non cernendo summouetur, etiamsi pro herede gerat, et in locum eius substitutus succedit. et deinceps si plures gradus sint, in singulis simili ratione idem contingit.

§ 176. Accordingly, if the person instituted in the first degree accepts the inheritance, he is heir, and the substitutes are excluded: if he fail to declare with due formality, he is barred in spite of acts of heirship, and his place is taken by the substitute; and if there are several degrees, in every one a similar result occurs.

§ 177. Sed si cretio sine exheredatione sit data, id est *in* haec uerba SI NON CRE*V*ERIS TVM P. MEVIVS HERES ESTO, illud diuersum inuenit*ur*, qu*od* si prior omissa cretione pro herede gerat, substitutum in partem admittit et fiunt ambo aequis partibus heredes. quodsi

§ 177. If the formula prescribing a term of deliberation contains no clause of disherison, but merely consists of these words: 'If thou fail to declare, be Publius Mevius my heir' [cretio imperfecta], the result is herein different, that, if the person first instituted, though he omit the solemn declaration,

neque cernat neque pro herede gerat, tum sane in uniuers*um* summouetur, et substitutus in totam hereditatem succedit.

act as heir, the substitute is only admitted to a portion, and both take a moiety: if he neither formally declare nor act as heir, he is entirely excluded, and the substitute succeeds to the whole inheritance.

§ 178. Sed Sabino quidem placuit, quamdiu cernere et eo modo heres fieri possit prior, etiamsi pro herede gesserit, non tamen admitti substitutum; cum uero cretio finita sit, tum pro herede gerente admitt*i* substitutum. aliis uero placuit etiam superante cretione posse eum pro herede gerendo in partem substitutum admittere et amplius ad cretionem reuerti non posse.

§ 178. It was the opinion of Sabinus that, as long as a term for formally declaring and thereby becoming heir subsists, a person in a higher grade does not let in the substitute, even if he informally act as heir, and that only after the expiration of the term is the substitute admitted instead of the person instituted, who has been acting as heir. But the other school held that, even pending the allotted term, informal acts of heirship let in the substitute and bar the prior heir from reverting to his right of formal declaration.

§ 179. Liberis nostris inpuberibus quos in potestate habemus non solum ita ut supra diximus substitue*re* poss*u*mus, id est ut si heredes non extiterint, alius nobis heres sit; sed eo amplius ut, etiamsi heredes nobis extiterint et adhuc inpuberes mortui fuerint, sit iis aliquis heres; uelut hoc modo TITIVS FILIVS MEVS MIHI HERES ESTO. SI FILIVS MEVS MIHI ⟨*HERES NON ERIT SIVE HERES*⟩ ERIT ET *P*RIVS MORIATVR QVAM IN SVAM TVTELAM VENERIT, TVN*C* SEIVS HERES ESTO.

Inst. 2, 16 pr.

§ 179. To children below the age of puberty in the power of the testator, not only can such a substitute as we have described be appointed, that is, one who shall take the inheritance on their failure to inherit, but also one who, if after inheriting they die before attaining the age of puberty, shall be their heir; which may be done in the following terms: 'Be my son Titius my heir, and if my son does not become my heir, or after becoming my heir die before becoming his own guardian, [that is before attaining the age of puberty], then be Seius the heir.'

§ 180. Quo casu siquidem non extiterit heres filius, substitutus patr*i* fit here*s*; *si uero* heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. quam ob rem duo quodammodo sunt

§ 180. In which case, if the son fail to inherit, the substitute is the heir of the testator, but if the son die after inheriting and without attaining the age of puberty, the substitute is heir to the son. Thus there are two wills, so to

testamenta, aliud patris, aliud filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum est testamentum duarum hereditatum. Inst. l. c.

§ 181. Ceterum ne post obitum parentis periculo insidiarum subiectus uide*a*tur pupillus, in usu est uulgarem quidem substitutionem palam facere, id est eo loco quo pupillum heredem instituimus; ⟨*nam*⟩ uulgaris substitutio ita uocat ad hereditatem substitutum, si omnino pupillus heres non extiterit; quod accidit cum uiuo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilice*t* uiuo testatore omnia quae in testamento scripta sint ignorentur. *i*lla*m* autem substitutionem per quam, *etiamsi* heres extiterit pupillus et intra pubertatem decesserit, substitutum uocamus, separatim in inferioribus tabuli*s* scribimus, easque tabulas proprio lino propriaque cera consignamus, et in prioribus tabulis cauemus, ne inferiores tabulae uiuo filio et adhuc inpubere aperiantur. sed longe *t*utius est utrumque genus substitutionis [separatim] in inferioribus tabulis consignari. qu*od si* ita [consignatae uel] separatae fuerint substitutione*s*, ut diximus, e*x* priore potest intellegi in altera [alter] quoque idem esse substitutus. Inst. 2, 16, 3.

§ 182. Non solum au*tem* heredibus institutis inpuberibus liberi*s* ita substituere poss*u*mus, ut si ante pubertatem mortui fuerint, sit is heres quem nos uoluerimus, sed etiam exhere*d*atis. itaque eo casu si quid pupillo ex hereditatibus lega-

speak, the father's and the son's, just as if the son himself had instituted an heir; or at any rate there is one will dealing with two inheritances.

§ 181. However, to save the ward from the danger of foul play after the death of the parent, it is common for the ordinary substitution to be made openly, that is, in the clause wherein the ward is instituted, for as the ordinary substitution only calls a man to the succession in case of the ward altogether failing to inherit, and this can only occur by his death in the lifetime of his parent, the substitute in this case is open to no suspicion of crime, because while the testator is alive the contents of the will are a secret. But the substitution, wherein a man is named heir after the succession and death of the ward before reaching the age of puberty, is written separately on later tablets, tied with their own cords and sealed with their own wax, and it is prohibited in the prior tablets that the will should be opened in the lifetime of the son before he attains the age of puberty. Indeed it is far safer that both kinds of substitution should be sealed up separately in two subsequent tablets, for if the ordinary substitution is contained in the first tablets it is easy to conjecture that the same substitute is appointed in the second.

§ 182. Not only when we appoint children under the age of puberty our heirs can we make such a substitution that if they die before puberty the substitute is their heir, but we can do it even when we disinherit them, so that in case the ward should

tisue aut donationibus propinquorum adquisitum fuerit, id *omne ad* substitutum pertinet.
Inst. 2, 16, 4.

§ 183. Quaecumque diximus de substitutione inpuberum libe*ro*rum uel heredum institutorum uel exheredatorum, eadem etiam de postumis intellegemus.
Inst. l. c.

§ 184. Extraneo uero heredi instituto ita substituere non possum*us*, ut si heres extiterit et intra aliquod tempus decesserit, alius ei heres sit; sed hoc solum nobis permissum est, ut eum p*er* fideicommissum obligemus, ut hereditatem nostram totam uel ⟨*pro*⟩ parte restituat; quod ius quale sit, suo loco trademus. Inst. 2, 16, 9.

acquire anything either by heirship, legacies, or by gifts of his relatives, all will belong to the substitute.

§ 183. What has been said of substitution to children below the age of puberty, whether appointed heirs or disinherited, is true of substitution to afterborn children.

§ 184. To a stranger instituted heir we cannot appoint a substitute who, if the stranger inherit and die within a certain time, is to be his heir; but we have only power to bind him by a trust to convey the inheritance to another, in part or in whole, a right which shall be explained in the proper place. [2 § 277.]

§ 177. It will be observed that this rule deviates from the principle laid down in § 166. A constitution of Marcus Aurelius changing the law further in the same direction, and mentioned by Ulpian (Sed postea divus Marcus constituit, ut et pro herede gerendo ex asse fiat heres, 22, 34. 'Subsequently Marcus Aurelius enacted that acts of heirship would make him [the person instituted, in the case of cretio imperfecta] exclusive heir'), was clearly not enacted when this paragraph was written by Gaius, and furnishes an indication of the date at which this book of his Institutions was published. Marcus Aurelius was sole emperor A. D. 169–176.

§ 179. Cicero frequently mentions a great case in which the question arose whether a vulgaris substitutio may be implied from a pupillaris substitutio. The centumviral court decided that the intention rather than the words of the testator should prevail, and that the heir appointed to succeed the son in case the son died before puberty should be deemed appointed to succeed the testator in case no son was born: Malim mihi L. Crassi unam pro M'. Curio dictionem quam castellanos triumphos duos, Brutus 73, 'I would rather have made the single speech of Lucius Crassus for Manius Curius than have had two triumphs for the capture of fortresses.' The other passages are worth referring to De Orat. 1, 39, 57; 2, 6, 32; Brutus, 39, 52; Pro Caecina, 18, 53; Topica, 10, 44. Marcus Aurelius enacted that in every case pupillaris substitutio should be implied in vulgaris substituto and vice versa, unless the contrary intention was expressed, Dig. 28, 6, 4.

§ 184. That is to say, we cannot by the ordinary rules of law limit an inheritance so as to make it subject to a resolutive condition or determinable at a future time. All we can do is to direct the heir by way of trust (fidei commissum) to reconvey the inheritance to some one at a future time or on the happening of some future event. Hereditas itself, strictly speaking, is indelible (semel heres semper heres). Regula est juris civilis qua constitutum est hereditatem adimi non posse, Dig. 28, 2, 13, 1. Cf. §§ 246–257, comm.

DE HEREDIBVS INSTITVENDIS.

§ 185. Sicut autem liberi homines, ita et serui, tam nostri quam alieni, heredes scribi possunt.

§ 186. Sed noster seruus simul et liber et heres esse iuberi debet, id est hoc modo STICHVS SERVVS MEVS LIBER HERESQVE ESTO, uel HERES LIBERQVE ESTO.

§ 187. Nam si sine libertate heres institutus sit, etiamsi postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona *eius* non constitit; ideoque licet alienatus sit, non potest iussu domini noui cernere hereditatem.

§ 188. Cum libertate uero heres institutus siquidem in ea*dem* causa durauerit, fit ex testamento liber et inde necessarius heres. si uero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu noui domin*i* adire hereditatem debet, qua ratione per eum dominus fit heres; nam ips*e* neque heres neque liber esse potest. Inst. 2, 14, 1.

§ 189. Alienus quoque seruus heres institutus si in eadem causa durauerit, iussu domini hereditatem adire debet; si uero alienatus ab eo fuerit aut uiuo testatore aut post mortem eius,

§ 185. Not only freemen but slaves, whether belonging to the testator or to another person, may be instituted heirs.

§ 186. A slave belonging to the testator must be simultaneously instituted and enfranchised in the following manner: 'Stichus, my slave, be free and be my heir;' or, 'Be my heir and be free.'

§ 187. If he is not enfranchised at the same time that he is instituted, no subsequent manumission by his owner enables him to take the succession, because the institution is originally void, and even if aliened he cannot formally declare his acceptance by the order of the new master.

§ 188. When a slave is simultaneously instituted and enfranchised, if he continue in the same condition, the will converts him into a freeman and a necessary heir: if the testator himself manumits him in his lifetime, he is able to use his own discretion about acceptance: if he is aliened he must have the order of his new master to accept, and then his master through him becomes heir, the alienated slave himself becoming neither heir nor free.

§ 189. When another person's slave is instituted heir, if he continue in the same position, he must have the order of his master to accept the succession; if aliened by him in the lifetime of the tes-

antequam cernat, debet iussu noui domini cernere; si uero manumissus est, suo arbitrio adire hereditatem potest.

Inst. l. c.

tator, or after his death before formal acceptance, he must have the order of the new master to be able to accept: if manumitted before acceptance, he is able to follow his own judgement as to accepting.

§ 190. Si autem seruus alienus heres institutus est uulgari cretione data, ita intellegitur dies cretionis cedere, si ipse seruus scierit se heredem institutum esse, nec ullum inpedimentum sit, quominus certiorem dominum faceret, ut illius iussu cernere possit.

§ 190. When a slave of another person is instituted heir with the ordinary term of cretio, the term only begins to run from the time when the slave has notice of his appointment, and is not prevented in any way from informing the master so that he may at his order make formal acceptance.

§ 187. This rule was abolished by Justinian, who enacted that the enfranchisement of the testator's slave, though unexpressed, should always be implied in his institution as heir. Cod. 6, 27, 5; Inst. 1, 6, 2.

§ 188. Justinian explains why the slave lost his liberty: Destitisse enim a libertatis datione videtur dominus qui eum alienavit, Inst. 2, 14, 1. 'A revocation of the bequest of liberty is inferred from the fact of his alienation.' If we ask why the implied intention that suffices to revoke the enfranchisement does not suffice to revoke the institution, the answer is, that a bequest can be revoked by any act clearly implying an intention to revoke, whereas an institution requires a more solemn revocation, by execution of a later will, or some other means, §§ 147-151, comm.

§ 189. What was the motive of instituting as heir the slave of another person? Such a disposition could not be dictated by kindness to the slave, for he would probably gain nothing by his institution; but was a device adopted for two purposes, (1) for facilitating the conversion of a succession into money, and (2) for securing an institution against failure.

(1) By such a disposition the testator gave the proprietor of the slave, whose benefit was intended, the option of either becoming actual heir, or of doing, what he could not otherwise readily do, i.e. of receiving the net value, or a large portion of the net value, of the succession, without incurring the expense of the annexed sacred rites (sacra) and the burden of administration, by practically selling the succession for the highest price he could get to any one who was willing to incur these expenses and troubles as a matter of speculation. To effect this, he had only to sell the slave at a price enhanced by his character of institutus. The slave thereupon, making aditio of the inheritance in obedience to an order of the purchaser, vested

the inheritance in the purchaser. If the former proprietor was reluctant to part with his slave, he had only to bargain for his reconveyance by a fiducia or condition annexed to the sale or mancipatio. Reddendus (or in the time of Gaius it might have been a case of mancipatio cum fiducia) est servus ea conditione ut, cum jussu ejus adierit, rursum retradatur. By this branch of speculation the instituted slave might pass through many hands before the succession vested, Dig. 37, 11, 2, 9.

(2) A second object gained by the institution of another person's slave was the transmission of an inheritance to the heirs of such person. If the heir instituted died in the lifetime of the testator, the institution failed, and the failure could not be prevented by the substitution (secondary institution) of the heir of the person instituted, for such heir would be a persona incerta, § 242. The difficulty was met by instituting a slave, who on the death of his master, the virtual heir, would become the slave of the master's heir, and acquire for him the succession of the testator. To guard against the contingency of the death of the slave in the lifetime of the testator, several slaves might be instituted by way of substitution. Ihering, § 56. An inheritance delated to a slave is said to be ambulatory: Ambulat cum dominio bonorum possessio, l. c. (In a similar way we might say: ambulat cum capite noxa, 4 § 77.)

§ 190. Si ipse servus scierit se heredem institutum. The knowledge of the slave was material for the purpose of acquisition, since the slave is regarded as if he were heir, though acquiring not for himself but for his master. Cf. Inst. 3, 17, 1 and 2.

A slave instituted heir might be the property of several masters, who when he entered upon the inheritance would become co-heredes of it according to their respective shares in him. Inst. 2, 14, 3. In the same title of the Institutes, Justinian mentions that an heir might either be appointed to take the whole of an inheritance or to share it with other co-heirs in any proportions. We may briefly state the technical terms and rules of interpretation by which different shares were allotted. An inheritance was commonly regarded as a pound (as) consisting of twelve ounces (unciae). The different fractions were thus denominated: uncia, a twelfth of an as, or an ounce; sextans, a sixth of an as, or two ounces; quadrans, a fourth of an as, or three ounces; triens, a third of an as, or four ounces; quincunx, five ounces; semis, half an as, or six ounces; septunx, seven ounces; bes (bis triens), two thirds of an as, or eight ounces; dodrans (deme quadrantem), an as minus a fourth, or nine ounces; dextans (deme sextantem), an as minus a sixth, or ten ounces; deunx (deme unciam), an as minus an ounce, or eleven ounces; as, twelve ounces.

An heir instituted in twelve ounces (ex asse) took the whole: but it was a rule that no one could be partly testate and partly intestate, and therefore if an heir were instituted in a part (ex parte) and no other co-heir instituted, that part represented a pound, and the heir took the whole. So if the shares allotted to several co-heirs amounted to more than twelve ounces, then, if no other heir was appointed with an unexpressed share, the as was deemed to consist of more than twelve ounces, and each co-heir took a ratable part of the inheritance. If one heir were instituted in a part, say ex besse, and a co-heir were instituted for whom no part was expressed, then the co-heir would take the residue of the as, that is, would be deemed to be instituted ex triente. But if the parts expressed for certain heirs exhausted or exceeded the as and another heir or heirs were named without express shares, then the whole inheritance was supposed to consist of two asses (dupondius) and the expressed shares were reduced to so many ounces out of twenty-four, the heir or heirs with unexpressed parts taking the residue. Similarly, if necessary, the inheritance was supposed to consist of thirty-six ounces.

If the institution of one co-heir lapsed, the shares of the remaining co-heirs were ratably augmented (accretio), just as, if originally less than twelve ounces had been distributed, the expressed shares of each would be ratably augmented so as to exhaust the inheritance.

This rule, however, was modified by the leges caducariae, passed chiefly to discourage celibacy, namely the lex Julia de maritandis ordinibus, A. D. 4, and the lex Papia Poppaea, on marriage and succession, A. D. 9, in which the provisions of the lex Julia were incorporated, for which reason both laws are sometimes referred to as lex Julia et Papia.

Caducum is a devise or bequest, valid at Civil law, but vacated by some particular law or statute, such as a legacy to a celibate or Latinus Junianus, in case the former fails within a hundred days to comply with the law [the Lex Papia], or the latter to acquire full citizenship; or in case of the institution of a co-heir, or bequest to a legatee who dies or becomes an alien before the will is opened, Ulpian, 17, 1. [By the Civil law, unconditional devises and bequests vested (dies cedit) at the death of the testator (though still defeasible by the failure of the will); by the lex Papia Poppaea not before the opening of the will, thus making the chance of a lapse greater, but Justinian re-established the rule of Civil law.] Cf. Roby, Roman Law, Bk. III, ch. x, B.

The leges caducariae, which fixed the conditions of caducity, were aimed against the coelebs and the orbus. Cf. §§ 111, 144, 286. Coelebs is defined to be an unmarried man between the age of twenty and sixty, or an unmarried woman between the age of twenty and fifty. Orbus is a man between fifty and sixty without children, natural or adoptive,

An unmarried person could take nothing as heres extraneus or legatee; an orbus could only take half of the devise or bequest intended for him. The inheritance or legacy thus lapsed was allotted by the leges caducariae in the first place, in the case of a legacy, to conjoint legatees of the same specific thing if the legatees had children; in the second place to children or parents of the deceased who were instituted heirs in his will; in the third place to heirs and other legatees having children; and in last remainder to the treasury (aerarium), § 206. Caracalla, A. D. 212–217, made them lapse immediately to the fiscus; Hodie ex constitutione imperatoris Antonini omnia caduca fisco vindicantur, sed servato jure antiquo liberis et parentibus, Ulpian, 17, 2. But from the rules of caducity ascendants and descendants of the testator to the third degree were excepted both by the lex Papia and by the constitution of Caracalla. Constantine, A. D. 320, abolished the pains and penalties of celibacy and childlessness, Cod. 8, 57, and Justinian formally and finally abrogated the leges caducariae.

By substitutions, or alternative institutions, testators were able to modify the course of accrual by Civil law (jus accrescendi), and, what perhaps was still more interesting, to escape from the operation of the laws of caducity, by which sometimes a whole inheritance might fall into the clutches of the treasury.

§ 191. Post haec uideamus de legatis. quae pars iuris extra propositam quidem materiam uidetur; nam loquimur de his iuris figuris quibus *per* uniuersitatem res nobis adquiruntur; sed cum omni modo de testamentis deque heredibus qui testamento instituunt*ur* locuti sumus, non sine causa sequenti loco poterit haec iuris materia tractari. Inst. 2, 20, pr.

§ 191. Let us now examine legacies, a kind of title which seems foreign to the matter in hand, for we are expounding titles whereby aggregates of rights are acquired; but we had at any rate to treat of wills and heirs appointed by will, and it is natural in close connexion therewith to consider this species of title [for a legacy is an accessory of a will].

[DE LEGATIS.]

§ 192. Legatorum itaque genera sunt quattuor: aut enim per uindicationem legamus aut per damnationem aut sinendi modo aut per praeceptionem.

§ 192. Legacies are of four kinds; by vindication, by condemnation, by permission, by preception.

§ 193. Per uindicationem hoc modo legamus TITIO uerbi gratia HOMINEM STICHVM DO LEGO; sed ⟨*et*⟩ si alter*utrum* uerbum posi-

§ 193. A legacy by vindication is in the following form: 'To Lucius Titius I give and bequeath, say, my slave Stichus,' or only

tum sit, ueluti DO aut LEGO, aeque per ui*n*dicationem legatum est; item, ut magis *uisum* est, si ita legatum fuerit SVMITO, uel ita SIBI HABETO, *uel* ita CAPITO, aeque per uindicationem legatum est.

one word need be used as, 'I give or I bequeath;' and other terms such as: 'Let him take,' 'Let him have,' 'Let him seize,' equally confer a legacy by vindication according to the prevailing opinion.

§ 194. Ideo *au*tem per uindicationem legatum appellatur, qui*a* post aditam hereditatem statim ex iure Quiritium res legatarii fit; et si eam rem legatarius uel ab herede uel ab alio quocumque qui eam possidet petat, uindicare debet, id est intendere suam r*em* ex iure Quiritium esse.

§ 194. It is so called, because immediately on the acceptance of the inheritance the thing becomes the Quiritarian property of the legatee, and if he claims it from the heir or any other possessor, he ought to vindicate it, that is, claim by action that he is owner thereof by law of the Quirites.

§ 195. In eo solo dissentiunt prudentes, quod Sabinus quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarii, etiamsi ignoret sibi legatum | esse [dimissum], *sed* posteaquam scierit et ——— lega|tum, *pro*inde esse atque si legatum non esset; Nerua uero et Proculus ceterique illius sc*h*olae auctores non alit*er* putant rem legatarii fieri, quam si uoluerit eam ad se pertinere. sed hodie ex diui Pii Antonini constitutione hoc magis iure uti *u*idemur quod Proculo placuit; nam cum legatus fuisset Latinus *per* uindicationem coloniae, Deliberent, inquit, decuriones an ad se uelint pertinere, proinde ac si uni legatus esset.

§ 195. So far the two schools are agreed, the only point in dispute between them is this, that according to Sabinus and Cassius and the other authorities of my school, what is thus left becomes the property of the legatee immediately on the acceptance of the inheritance, even before he has notice of the legacy, and on notice and repudiation by the legatee, the legacy is cancelled. While Nerva and Proculus and the jurists of that school make the passing of the property to the legatee depend on his accepting the legacy; and now a constitution of the late emperor Pius Antoninus seems to have established the doctrine of Proculus as the rule, for in the case of a Latinus Junianus bequeathed by vindication to a colony, the Emperor said, 'The decurions must deliberate whether they wish to become owners as they would have to do if the bequest was to an individual.'

§ 196. *E*ae autem sol*a*e res per uindicationem legant*ur* recte quae ex iure Quiritium ipsius testatoris sunt. sed eas quidem res quae pondere numero men-

§ 196. Only those things are properly bequeathed by vindication which are the Quiritarian property of the testator; things, however, estimated by weight,

sura constant placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, ueluti uinum oleum frumentum pecuniam numeratam. ceteras res uero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo faceret testamentum et quo moreretur; alioquin inutile est legatum.

§ 197. Sed sane hoc ita est iure ciuili. postea uero auctore Nerone Caesare senatusconsultum factum est, quo cautum est, ut si eam rem quisque legauerit quae eius numquam fuerit, proinde utile sit legatum, atque si optimo iure relictum esset; optimum autem ius est per damnationem legati, quo genere etiam aliena res legari potest, sicut inferius apparebit.

§ 198. Sed si quis rem suam legauerit, deinde post testamentum factum eam alienauerit, plerique putant non solum iure ciuili inutile esse legatum, sed nec ex senatusconsulto confirmari. quod ideo dictum est, quia et si per damnationem aliquis rem suam legauerit eamque postea alienauerit, plerique putant, licet ipso iure debeatur legatum, tamen legatarium petentem posse per exceptionem doli mali repelli quasi contra uoluntatem defuncti petat.

§ 199. Illud constat, si duobus pluribusue per uindicationem eadem res legata sit, siue coniunctim siue disiunctim, et omnes ueniant ad legatum, partes ad singulos pertinere et deficientis portionem collegatario adcrescere. coniunctim autem ita legatur TITIO ET SEIO HOMINEM STICHVM DO LEGO;

number, or measure, need only be the Quiritarian property of the testator at the time of his death, for instance, wine, oil, corn, ready-money: other things are required to be the testator's Quiritarian property at both periods, both at the time of his death and at the time of making his will, or the legacy is void.

§ 197. However, this is only the civil law. In later times, on the proposition of Nero, a senatusconsult was passed, providing that if a testator bequeathed a thing which never belonged to him, the bequest should be as valid as if it had been made in the most favourable form; the most favourable form being by condemnation, whereby the property of another person may be bequeathed, as will presently appear.

§ 198. If a man bequeath a thing belonging to him, and afterwards aliene it, most jurists hold that the bequest is not only avoided at civil law, but does not obtain validity by the senatusconsult, the ground of this opinion being that, even when a thing is bequeathed by condemnation and afterwards aliened, although the legacy is due ipso jure, a claim to it, as most jurists hold, may be repelled by the plea of fraud, as contravening the testator's intention.

§ 199. It is a settled rule, that if the same thing be bequeathed by vindication to two or more persons, whether jointly [in the same sentence] or severally [in different sentences], and all claim the legacy, each is only entitled to a ratable part, but a lapsed portion accrues to the co-legatees. A joint bequest is as follows;

disiunctim ita L. TITIO HOMINEM STICHVM DO LEGO. SEIO EVNDEM HOMINEM DO LEGO.

'To Titius and Seius I give and bequeath my slave Stichus;' a several bequest as follows: 'To Lucius Titius I give and bequeath my slave Stichus. To Seius I give and bequeath the same slave.'

§ 200. Illud quaeritur, quod sub condicione per uindicationem legatum est, pendente condicione cuius *si*t. nostri praeceptor*es* heredis esse putant exemplo statuliberi, id est eius serui qui testamento sub aliqua condicione liber esse iussus est; quem constat interea heredis seruum esse. sed diuers*ae* scholae auctores putant nullius interim ea*m* rem esse; quod multo magis dicunt de eo quod [sine condicione] pure legatum est, antequam legatarius admittat legatum.

§ 200. When a condition is annexed to a bequest by vindication, it is a question who, pending the condition, is the owner: my school say, the heir, as in the case of the slave conditionally enfranchised by will, who is admittedly in the interim the property of the heir: the other school assert that there is no interim proprietor, and they insist still more strongly that this is so in the case of an unconditional simple bequest before the acceptance by the legatee.

§ 201. Per damnationem hoc modo legamus HERES MEVS STICHVM SERVVM MEVM DARE DAMNAS ESTO; sed et si DATO scriptum fuerit, per damnationem legatum est.

§ 201. A legacy by condemnation is in the following form: 'Be my heir condemned to give my slave Stichus,' or simply, 'Let my heir give my slave Stichus.'

§ 202. Eoq*ue* genere legati etiam aliena res legari potest, *i*ta ut heres redimere ⟨*rem*⟩ et praestare aut aestimationem eius dare debeat.

§ 202. By this form a testator may bequeath a thing belonging to another person, binding the heir to purchase and deliver the thing, or pay its value.

§ 203. Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, uelut FRVCTVS QVI IN ILLO FVNDO NATI ERVNT, aut QVOD EX ILLA ANCILLA NATVM ERIT.

§ 203. A thing which does not exist provided that it will exist may be bequeathed by condemnation, as the future produce of such and such land, or the child to be born of such and such female slave.

§ 204. Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per uindicationem legatum continuo legatario adquiritur, sed nihilo minus heredis est. et ideo legatarius in personam agere debet, id est in-

§ 204. A bequest in this form, even though no condition is annexed, unlike a bequest by vindication, is not forthwith on the acceptance of the inheritance the property of the legatee, but continues the property of the heir; hence the legatee must sue for it by personal action, that is, lay claim

tendere heredem sibi dare oportere; et tum heres, si ⟨*res*⟩ mancipi sit, mancipio dare aut in iure cedere possessione*m*que tradere debet; si nec mancipi sit, sufficit si tradiderit. nam si mancipi rem tantum tradiderit nec mancipauerit, usucapion*e* pleno iure fit legatarii; conpletur autem usucapio, sicut alio quoque loco diximus, mobilium quidem rerum anno, earum uero quae solo tene*n*tur biennio.

that the heir is bound to convey it to him; and in this case the heir, if the thing is mancipable, ought to convey it to him by mancipation or to surrender it before a magistrate and deliver possession of it; if not mancipable, mere delivery of possession suffices: for if a mancipable thing is merely delivered without mancipation, the legatee must acquire plenary ownership by usucapion, and usucapion, as before mentioned, in the case of movables requires a year's possession, in the case of landed property two years' possession.

§ 205. Est et illa differe*n*tia huius ⟨*et*⟩ per uindicationem legati, quod si eadem res duobus pluribusue per damn*a*tionem legata sit, siquidem coniunctim, plane singulis partes debentur sicut in illo ⟨*quod per*⟩ uindica*tionem* lega*tum est*, *si ue*ro disiunctim, singulis solid*um* de*bet*ur. ita fit, ut scilicet heres alteri rem, alteri aestimationem eius praestare debeat. et in coniu*n*ctis deficientis portio non ad collegatarium pertinet, sed in hereditate remane*t*.

§ 205. There is another difference between bequest by vindication and bequest by condemnation herein, that if the same thing is bequeathed to two or more by condemnation, if they are named jointly, each is entitled to a ratable part, as in legacy by vindication; if severally, each is entitled to the whole, and the heir is bound to convey the specific thing to one, and the value to the other; and in a joint bequest a lapsed portion does not accrue to the co-legatee, but belongs to the heir.

§ 206. Quod autem diximus deficientis portione*m* *in* per damnationem quidem legato in hereditate retiner*i*, in per uindicationem uero collegatario adcrescere, admonendi sumus ante legem Papiam *hoc* iure ciuili ita fuiss*e*; post legem uero Papiam deficientis portio caduca fit et ad eos pertinet qui in eo testamento liberos habent.

§ 206. The statement that a lapsed portion in legacy by condemnation falls to the heir, and in legacy by vindication accrues to the co-legatee, be it observed, gives the rule of the civil law before the lex Papia; but since the lex Papia, a lapsed portion becomes caducous, and belongs to the legatees who have children.

§ 207. Et quamuis prima causa sit in caducis uindicandis heredum liberos habentium, deinde si heredes liberos non habeant, legatariorum liberos

§ 207. And although the first title to a caducous legacy is that of heirs with children, and the second, if the heirs are childless, of legatees with children, yet the

habentium, tamen ipsa lege Papia significatur, ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habebunt.

lex Papia itself declares that in a joint bequest a co-legatee with children is to be preferred to heirs even though they have children.

§ 208. Sed plerisque placuit, quantum ad hoc ius quod lege Papia coniunctis constituitur, nihil interesse utrum per uindicationem an per damnationem legatum sit.

§ 208. And most jurists hold that, as to the rights which the lex Papia gives to joint legatees, it makes no difference whether the bequest is by vindication or by condemnation.

§ 209. Sinendi modo ita legamus HERES MEVS DAMNAS ESTO SINERE L. TITIVM HOMINEM STICHVM SVMERE SIBIQVE HABERE.

§ 209. A bequest by permission is in the following form: 'Be my heir condemned to permit Lucius Titius to take and to have to himself my slave Stichus.'

§ 210. Quod genus legati plus quidem habet ⟨*quam*⟩ per uindicationem legatum, minus autem quam per damna*tio*nem. nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui; cum alioquin per uindicationem nisi suam rem legare non potest, per damnationem autem cuiuslibet extranei rem legare potest.

§ 210. A bequest in this form has a wider scope than one in the form of vindication, but less than one in the form of condemnation, for hereby not only can the testator's property be effectively bequeathed, but also that of the heir, whereas by the form of vindication the testator can only bequeath his own property, and by the form of condemnation he can bequeath the property of any stranger.

§ 211. Sed siquidem mortis testatoris tempore res uel ipsius testatoris sit uel heredis, plane utile legatum est, etiamsi testamenti faciendi tempore neutrius fuerit.

§ 211. If at the time of the testator's death the thing thus bequeathed belong to the testator or the heir, the bequest is valid, even though at the time of making the will it belonged to neither.

§ 212. Quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse. quid ergo est? licet aliquis eam rem legauerit quae neque eius umquam fuerit neque postea heredis eius umqu*am* esse coeperit, ex senatusconsulto Neroniano proinde uidetur ac si per damnationem relicta esset.

§ 212. If it first belong to the heir after the death of the testator it is a question whether the bequest is valid, and it is most generally held to be invalid. However, even though a thing bequeathed never belonged to the testator or after his death became the property of the heir, by the senatusconsult of Nero all bequests are put on the same footing as a bequest by condemnation.

§ 213. Sicut autem per dam-

§ 213. Just as a thing bequeathed

nationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is [heres] tradendo uel mancipando uel in iure cedendo legatarii eam fecerit, ita et in sinendi modo legato iuris est; et ideo huius quoque legati nomine in personam actio est QVIDQVID HEREDEM EX TESTAMENTO DARE FACERE OPORTET.

by condemnation does not immediately on the acceptance of the inheritance belong to the legatee, but continues to belong to the heir until by delivery, or mancipation, or surrender before the magistrate, he makes it the property of the legatee; so it happens in bequest by permission, and accordingly this form of bequest is ground to support a personal action in the terms: 'Whatever the heir is bound by the will to convey or perform.'

§ 214. Sunt tamen qui putant ex hoc legato non uideri obligatum heredem, ut mancipet aut in iure cedat aut tradat, sed sufficere, ut legatarium rem sumere patiatur; quia nihil ultra ei testator imperauit, quam *ut* sinat, id est patiatur legatarium rem sibi habere.

§ 214. Although some hold that a bequest in this form does not bind the heir to mancipate or surrender before the magistrate, or convey by tradition, but is satisfied by his permitting the legatee to take the thing, as the testator only enjoined the heir to let him have it.

§ 215. Maior illa dissensio in hoc legato interuenit, si eandem re*m* duobus pluribusue disiu*n*ctim legasti; quidam putant utrisque solidam deberi, [sicut per uindicationem;] nonnulli occupantis esse meliorem condicionem aestimant, quia cum eo genere legati damnetur heres patientiam praestare, ut legatarius rem habeat, sequitur, ut si priori patientiam praestiterit et *is* rem sumpserit, se*cu*rus sit aduersus eum qui postea legatum petierit, quia neque habe*t* rem, ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

§ 215. A more serious question arises in another point respecting this form of bequest: if the same thing is bequeathed severally to two or more, some hold that each is entitled to the whole, [as in bequest by vindication (? condemnation);] others hold that the first occupant is alone entitled, because as this form of bequest only condemns the heir to suffer the legatee to have the thing, as soon as the first occupant has been suffered to take it, the heir is safe against any subsequent claimant, as he neither has possession of the thing, so as to let it again be taken, nor has fraudulently parted with possession.

§ 216. Per praeceptionem hoc modo leg*a*mus L. TITI*VS* HOMINEM STICHVM PRAECIPITO.

§ 216. A bequest by preception is in the following form: 'Let Lucius Titius take my slave Stichus by preception [before partition].'

§ 217. Sed nostri quidem praeceptores nulli alii eo modo

§ 217. My school hold that such a bequest can only be made to one

legari posse putant, nisi ei qui aliqua ex parte heres scriptus esse*t*; praecipere enim esse praecipuum sumere; quod tantum in eius person*a* procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit.

of several co-heirs, because preception, or previous taking, can only be attributed to a person who, taking as heir, over and above his portion as heir, and before partition of the inheritance between the co-heirs takes something as legatee.

§ 218. Ideoque si extraneo legatum fuerit, inutile est legatum; adeo ut Sabinus existimauerit ne quidem ex ⟨*senatus*⟩-consult*o* Neroniano posse conualescere: nam eo, inquit, senatusconsulto ea tantum confirmantur quae uerborum uitio iure ciuili non ualent, non quae propter ipsam personam legatarii non deberentur. sed Iuliano et Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum: nam ex uerbis etiam hoc casu accidere, ut iure ciuili inutile sit legatum, *i*nde manifestum ess*e*, quod eidem aliis uerbis recte legatur, ueluti p*er* uindicationem, *p*er damnationem, sinendi modo; tunc autem uitio personae legatum non ualere, cum ei legatum sit cui nullo modo legari possit, uelut peregrino cum quo testamenti factio non sit; quo plane casu senatusconsulto locus non est.

§ 218. Therefore, if a stranger is given a legacy in this form it is void, and Sabinus held that the flaw is not remedied by the senatusconsult of Nero, for that senatusconsult only cures verbal flaws which make a bequest void at civil law, not personal disabilities of the legatee. Julian, however, and Sextus held that this bequest also is made valid by the senatusconsult, as only being avoided at civil law by a verbal informality; as appears from the fact that the very same person might take by the bequest in another form, as in those by vindication, condemnation, or permission, whereas a personal defect in the legatee only invalidates the legacy, if the legatee is a person totally disqualified from taking any legacy whatever, e. g. an alien, who is incapable of taking anything under a will: in which case (they contend) the senatusconsult is clearly inapplicable.

§ 219. Item nostri praeceptores quod ita legatum est nulla ⟨*alia*⟩ ratione putant posse consequi *e*um cui ita fueri*t* legatum qu*am* iudicio familiae erciscundae quod inter heredes de hereditate erciscunda, id est diuidunda, accipi solet; officio enim iudicis id contineri, ut ei quod per praeceptionem legatum est adiudicetur.

§ 219. Again, my school hold that in this form of bequest, the only action by which a legatee can recover is the action for partition of an inheritance, the judge's commission including a power of adjudicating a thing bequeathed by preception.

§ 220. Vnde intellegimus

§ 220. From this it follows

nihil aliud secundum nostrorum praeceptorum opinionem per praeceptionem legari posse, nisi quod testatoris sit; nulla enim alia res quam hereditaria deducitur in hoc iudicium. itaque si non suam rem eo modo testator legauerit, iure quidem ciuili inutile erit legatum; sed ex senatusconsulto confirmabitur. aliqu*o* tamen casu etiam alienam rem ⟨*per*⟩ praeceptionem legari posse fatentur; ueluti si quis eam rem legauerit, quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant solut*a* pecuni*a* *l*uere eam rem, ut possit p*rae*cipere *is* cui ita legatum sit.

that, according to my school, nothing can be bequeathed by preception but what belongs to the testator, for nothing but what belongs to the inheritance forms the subject of this action. If, then, a thing that does not belong to the testator is bequeathed in this form, the bequest is void at civil law, but made valid by the senatusconsult. In one case they admit that another person's property may be bequeathed by preception, for instance, if a man bequeath a thing which he has conveyed by fiduciary mancipation to a creditor, as it is within the powers of the judge to order the co-heirs to redeem the property by payment of the mortgage debt, and thus enable the legatee to exercise his right of preception.

§ 221. *S*ed diue*r*sae s*c*hol*ae* auctores putant etiam extraneo per praeceptionem legari posse proinde ac si ita scribatur TITIVS HOMINEM STICHVM CAPITO, superuacuo adiecta PRAE sylla*ba*; ideoque per uindicationem ea*m* *rem* legatam uideri. quae sententia dicitur diui Hadriani constitution*e* confirmata esse.

§ 221. The other school hold that a stranger may take a bequest in the form of preception just as if it were in the form: 'Let Titius take my slave Stichus,' the addition [by preception, or, before partition] being mere surplusage, and the bequest being in effect in the form of vindication; and this opinion is said to be confirmed by a constitution of the late emperor Hadrian.

§ 222. Secundum hanc igitur opinionem si ea res ex iure Quiritium defuncti fuerit, po*test* a legatario uindicari, siue is unus ex heredibus sit siue extraneus; quodsi in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi uero familiae erciscundae iudicis officio praestabitur; quodsi nullo iure fuerit testatoris, tam heredi quam extraneo ex senatusconsulto utile erit.

§ 222. According to this view, if the thing was the Quiritarian property of the defunct, it can be recovered in a vindicatio by the legatee, whether an heir or a stranger, but if it was only the bonitarian property of the testator, a stranger will recover the bequest under the senatusconsult, an heir by the authority of the judge in an action for partition of inheritance. But if it was in no sense the property of the testator, either an heir or a stranger may recover it under the senatusconsult.

§ 223. Siue tamen heredibus secundum nostrorum opinionem, siue etiam extraneis secundum illorum opinionem, duobus pluribusue eadem res coniunctim aut disiunctim legata fuerit, singuli partes habere debent.

§ 223. Whether they are heirs, according to my school, or strangers, according to the other, if two or more legatees have the same thing bequeathed to them jointly or severally, each legatee is only entitled to a ratable portion.

§§ 194, 195. Justinian seems to accept the Sabinian view that an unconditional legacy is acquired by the legatee immediately upon the heir's entrance on the inheritance, without his assent or even his knowledge, though he may subsequently reject it: in the latter case the effect is the same as if the right had never been acquired. So also Justinian clearly takes the Sabinian view on the question of interim ownership mentioned in § 200. Cf. Dig. 8, 6, 19, 1. The testamenti factio passiva of municipalities, that is, their capacity as juristic persons to be made heirs or legatees, has already been noticed, 1 §§ 197–200, comm. § 238, comm.

§§ 196, 197. Cf. Si ea res, quae non fuit utroque tempore testatoris ex jure Quiritium, per vindicationem legata sit, licet jure civili non valeat legatum tamen senatusconsulto Neroniano firmatur quo cautum est ut quod minus pactis (aptis?) verbis legatum est perinde sit ac si optimo jure legatum esset: optimum autem jus legati per damnationem est, Ulpian, 24, 11 *a*.

By this senatusconsult of the Emperor Nero the four forms of legacy are not entirely abolished, but the importance of their distinctions is very much diminished. A legacy, by whatever form bequeathed, is henceforth always recoverable, provided it could have been effectively bequeathed in any form. As Sc. Neronianum made legatum per vindicationem transformable into legatum per damnationem, it made legatum per praeceptionem a species of Vindicatio, similarly transformable, and capable, therefore, of conferring res aliena as well as res testatoris not only on heres but also on non-heres. A fortiori it made legatum sinendi modo, a species of legatum per damnationem, capable of bequeathing res aliena.

Subsequently a constitution of Constantine, Constantius, and Constans, A. D. 339, which, as we have already seen, abolished the necessity of formal terms in instituting an heir, dispensed with them also in the remaining testamentary dispositions: Et in postremis ergo judiciis ordinandis amota erit sollennium sermonum necessitas, Cod. 6, 23, 15, 2. In legatis vel fidei commissis verborum necessaria non sit observantia, ita ut nihil prorsus intersit, quis talem voluntatem verborum casus exceperit aut quis loquendi usus effuderit, Cod. 6, 37, 21: apparently a part of the same constitution.

Three years afterwards, a constitution of Constantius and Constans abolished all legal formulas in the following terms: Juris formulae, aucupatione syllabarum insidiantes, cunctorum actibus penitus amputentur, Cod. 2, 57, 1. 'Legal formulas, with snares in every syllable to make them treacherous, in every occasion are to be utterly abolished.'

Finally, Justinian enacted ut omnibus legatis una sit natura, Inst. 2, 20, 2, that all bequests should be of one nature; and allowed them to be recovered by personal action or by real action also, at the option of the legatee, if ownership or jus in re in a specific thing was directly bequeathed to them; for some subjects are essentially incapable of recovery by real action; e. g. if a determinate quantity of anything estimated by number, measure, or weight, were bequeathed by a testator who had none in his possession at the time of his death, § 196, the heir would be bound to procure and convey it or its value to the legatee, § 202, but there would be no specific thing in existence which the legatee could recover by real action.

§ 199. Co-legatees per vindicationem would be each entitled to the whole except for the concurrence of the other co-legatees. Accordingly, if one fails the others benefit by Accretio, Dig. 32, 80. Co-legatees per damnationem, if conjunctim, are never entitled to more than a ratable portion, and failure of one benefits the heir: but co-legatees of this kind, if disjunctim, are entitled to as many wholes as there are co-legatees, § 205. Co-legatees, if sinendi modo, were a class of co-legatees per damnationem, but if the bequest was disjunctim, and one or more failed to take, only the first occupant was entitled, § 215.

§ 207. The loss of the legacies, which they otherwise would have acquired under the lex Papia, was one of the penalties whereby the legislator endeavoured to deter heirs and legatees from undertaking secret trusts (fideicommissum tacitum) contrived for the purpose of evading some disqualification. In fraudem juris fidem accommodat, qui vel id quod relinquitur vel aliud tacite promittit restituturum se personae quae legibus ex testamento capere prohibetur, sive chirographum eo nomine dederit, sive nuda pollicitatione repromiserit, Dig. 34, 9, 10, pr. (from a treatise of Gaius on the lex Julia et Papia). In England secret trusts one of the causes which led to the passing of the statute of Uses and Trusts. At Rome secret trusts, tacita fideicommissa (on which Gaius wrote a treatise, Dig. 34, 9, 23), were discouraged by being made one of the cases of Ereption for unworthiness, § 151, comm. Si quis in fraudem tacitam fidem accommodaverit, ut non capienti fideicommissum restituat, nec quadrantem eum deducere senatus censuit, nec caducum vindicare ex eo testamento si liberos habeat, Ulpian, 25, 17. 'An heir

who lends his assistance to the evasion of the law by the acceptance of a secret trust in favour of a disqualified beneficiary loses by decree of the senate his right under the lex Falcidia to retain one fourth of his inheritance, and to claim the caducous legacies, to which by the lex Papia he would have been entitled as a father of children.'

§ 215. A passage in the Digest, 33, 2, 14, makes this depend on the intention of the testator. The words—per vindicationem seem to have been introduced into the MS. by mistake for per damnationem, cf. §§ 199, 205.

[AD LEGEM FALCIDIAM.]

§ 224. Sed ol*i*m quidem licebat totum patrimonium legatis atque libertatibus erogare nec quicquam heredi relinquere praeterquam inane nomen here*dis*; idque lex XII tabularum permittere uidebatur, qua cauetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his uerbis VTI LEGASS*I*T SVAE RE*I*, ITA IVS ESTO. qua*r*e qui scripti heredes erant, ab hereditate se abstinebant, et idcirco plerique intestati moriebantur. Inst. 2, 22, pr.

§ 224. By the ancient law a testator might exhaust his whole estate by bequests and enfranchisements, and leave nothing to the heir but an empty title; and this privilege seemed granted by the Twelve Tables, which concede an unlimited power of testamentary disposition, in these terms: 'As a man's last bequests respecting his property are, so let it be law:' hence the persons who were appointed heirs declined to accept the inheritance, and people commonly died intestate.

§ 225. Itaque lata est lex Furia, qu*a*, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortisue causa capere permissum non est. sed et haec lex non perfecit quod uoluit; qui enim uerbi gratia quinque milium aeris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare. Inst. l. c.

§ 225. This led to the enactment of the lex Furia, whereby, excepting certain specified classes, a thousand asses was made the maximum that a legatee or donee in contemplation of death was permitted to take. This law, however, failed to accomplish its purpose, for a testator with an estate of, say, five thousand asses, might leave to five legatees a thousand asses apiece, and strip the heir of the whole.

§ 226. Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortisue causa capere liceret quam heredes caperen*t*. ex qua lege plane quidem aliquid utique heredes habere uidebantur; sed tamen fere uitium simile

§ 226. This occasioned the enactment of the lex Voconia, which provided that no legatee or other person taking by reason of death should take more than the heirs took. By this law, some portion at all events was secured to the heir, but, like the former, it could

nascebatur; nam in multas legatariorum personas distributo patrimonio poterat ⟨*testator*⟩ adeo heredi minimum relinquere, ut non expediret heredi huius lucri gratia totius hereditatis onera sustinere.

Inst. l. c.

be defeated, for the multitude of legatees among whom a man could distribute his estate might leave so little to the heir as to make it not worth his while to undertake the burden of the whole inheritance.

§ 227. Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem. itaque necesse est, ut heres quartam partem hereditatis habeat. et hoc nunc iure utimur. Inst. l. c.

§ 227. At last, the lex Falcidia was enacted, prohibiting the bequest of more than three fourths of an estate, in other words, securing for the heir one fourth of the inheritance, and this is the rule of law now in force.

§ 228. In libertatibus quoque dandis nimiam licentiam conpescuit lex Fufia Caninia, sicut in primo commentario rettulimus.

§ 228. The enfranchisement of slaves was likewise kept within limits by the lex Fufia Caninia, as mentioned in the first volume of these Institutions. 1 §§ 42–46.

§ 224. A slightly different form of this celebrated ordinance is given by the Auctor ad Herennium: Paterfamilias uti super familia pecuniave sua legaverit ita jus esto, 1, 13, 23; also Cic. de Invent. 2, 50, 148.

§ 225. The lex Furia testamentaria, which is referred to by Cicero, although it imposed on the legatee who took more than a thousand asses a penalty of four times the amount of the excess, which was recoverable by manus injectio pura, 4 § 23, yet is instanced by Ulpian (1, 2) as a minus quam perfecta lex, because, though it imposed a penalty on the legatee, it did not invalidate the prohibited bequest. In a minus quam perfecta lex the legislator, instead of declaring invalid the disposition that he wished to discourage, or conferring on the person burdened by such disposition a counter right (exceptio) whereby he might defeat the claim of the person who sought to enforce such disposition, merely imposed on the creditor under such a disposition a penalty if he either enforced his claim by suit or if he even accepted voluntary payment from the person who stood in the relation of debtor. Minus quam perfecta lex est quae vetat aliquid fieri et si factum sit non rescindit sed poenam injungit ei qui contra legem fecit: qualis est lex Furia testamentaria quae plus quam mille assium legatum mortisve causa prohibet capere praeter exceptas personas, et adversus eum qui plus ceperit quadrupli poenam constituit, Ulpian, 1, 2. So the lex Furia de sponsu, 3 § 121, which perhaps was another clause of the enactment which contained the lex Furia testamentaria, imposed a penalty on the creditor who exacted more

than a ratable portion of a guaranteed debt from a single sponsor, 4 § 22. By the lex Falcidia, 40 B. C., on the contrary, a lex perfecta which superseded the lex Furia testamentaria, a legacy was absolutely null and void (ipso jure) beyond a certain extent and the heres as debtor could not be forced to pay more than the sum prescribed, a rule which may be expressed by the maxim, legata ipso jure minuuntur: and the Epistola Hadriani, 3 § 121, a law passed for the protection of the kind of surety which superseded sponsores and fidepromissores, conferred a counter right called Beneficium divisionis on the fidejussor or surety who was sued for more than a ratable portion of the debt, enabling him to defeat the valid claim of the creditor by the exceptio divisionis. Under the lex Furia testamentaria the heres could neither defend himself by alleging the absolute nullity of the excessive bequest (ipso jure) nor by pleading an opposing right (exceptio) whereby the valid claim of the legatee might be counteracted. 4 § 115, comm.

Assuming that the lex Furia de sponsu and the lex Furia testamentaria were two clauses of the same enactment, the lex Furia may have had the singular destiny of having provoked by antagonism the introduction of two new institutions in Roman jurisprudence. The desire of evading its penalties relating to sponsio may have been a cause of fidejussio; and the desire of evading its penalties relating to legata a stimulus to the invention of fideicommissa.

The exceptae personae of the lex Furia testamentaria were the cognates of that ascendant to the sixth degree with sobrino natus, or second cousin of the seventh, Ulpian, 28, 7; Vat. Fragm. 301.

§ 226. The lex Voconia, supposed to have been passed by the tribune Quintus Voconius Saxa, 169 B. C., contained a provision to the effect that a woman could not be instituted heiress to a classicus, or person scheduled in the first class of the census, i. e. registered as owner of property to the amount of a hundred thousand sesterces and upward, § 274; and by another provision of this enactment, mentioned in the text, it was provided the utmost amount that any one, male or female, could take as legatee, should be limited to half the value of the inheritance. This disposition of the lex Voconia was probably the origin of the form of legacy called partitio, § 254, whereby a testator bequeathed as legacy an aliquot part of his inheritance. A rich testator with one heres would leave to a woman by way of legacy one half, with two heredes one third, of the inheritance, and so on, if he wished to leave her the utmost the law permitted.

The result of the lex Voconia, coupled with the rules of pretermission and intestacy, is the following: a daughter might take half her father's estate either as legatee (partiaria, § 254), or, if pretermitted (praeterita), as heiress, § 124. If she was filia unica, she

might take the whole estate as heiress, if her father died intestate: but Romans were very averse to dying intestate; and in this event she would not have had a testamentary guardian and so have been much hampered in the free disposition of her property, at least till the agnatic guardianship of women was abolished.

§ 227. The terms of the principal clause of the lex Falcidia, passed B. C. 40, are given in the Digest 35, 2, 1, pr. 'Every Roman citizen who, after this law passes, makes a will, is entitled and empowered to give and bequeath whatever money he likes to any Roman citizen in accordance with the laws of Rome, provided that such bequest leave at least one fourth of the inheritance to be taken under that will by the heirs. Such bequests the legatees are permitted to accept without penalty (sine fraude) (an allusion to the penalty of the lex Furia), and the heir therewith charged is bound to pay.'

The words limiting the operation of the lex Falcidia to wills executed after the date of its enactment take this law out of the general rule respecting the temporal limits of the application of laws in the event of legislative innovations. The general rule for determining, on any change of the law, whether a given right is to be governed by the older or the newer law, is the principle that a new law should have no retroactive influence on vested rights (acquired rights), but should govern all that have yet to vest. Now under a will no one has vested rights, whatever his expectations, before the death of the testator. This date fixes the possible opening of the succession (vocatio heredis, delatio hereditatis), the vesting of the rights of the heir and also of the legatee (legatorum dies cedens, § 244), unless this is postponed till a later date, and determines the law by which they are governed. By the general rule, then, the lex Falcidia would have applied to all wills whose testators died after its enactment, at whatever date they were executed. The legislator wished to disarm the opposition of those who had made their wills by excepting them from its operation; though in many cases the lex Falcidia would be less rigorous than the lex Furia and lex Voconia, which it superseded, and testators would be glad to revise their testamentary dispositions. Savigny, System, § 394.

Some illustrations of the joint operation of the lex Falcidia and the Sc. Pegasianum, or rather the Sc. Trebellianum as modified by Justinian, will be presently given. § 259, comm.

[DE INVTILITER RELICTIS LEGATIS.]

§ 229. Ante heredis institutionem *in*utiliter legatur, scilicet quia testamenta uim ex institutione heredis accipiunt,

§ 229. A legacy bequeathed before an heir is instituted is void, because a will derives its operation from the institution of an

et ob id uelut caput et fundamentum intellegitur totius testamenti heredis institutio.

Inst. 2, 20, 34.

heir, and accordingly the institution of an heir is deemed the beginning and foundation of a will.

§ 230. Pari ratione nec libertas ante heredis institutionem dari potest. Inst. l. c.

§ 230. For the same reason a slave cannot be enfranchised before an heir is appointed.

§ 231. Nostri praeceptores nec tutorem eo loco dari posse existimant; sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.

§ 231. Nor, according to my school, can a guardian be nominated before an heir is appointed: according to Labeo and Proculus he may, because no part of the inheritance is given away by the nomination of a guardian.

§ 232. Post mortem quoque heredis inutiliter legatur, id est hoc modo CVM HERES MEVS MORTVVS ERIT, DO LEGO, aut DATO. ita autem recte legatur CVM HERES ⟨*MEVS*⟩ MORIETVR, quia non post mortem heredis relinquitur, sed ultimo uitae eius tempore. rursum ita non potest legari PRIDIE QVAM HERES MEVS MORIETVR; quod non pretiosa ratione receptum uidetur.

Inst. 2, 20, 35.

§ 232. A bequest to take effect after the death of the heir is void, that is to say, if limited in the following terms: 'After my heir's death I give and dispose,' or, 'let my heir give.' The following limitation is valid: 'When my heir dies,' because the legacy is not to take effect after his death, but at the last moment of his life. A bequest to take effect on the day preceding the death of the successor is void. This distinction reposes on no valid reason.

§ 233. Eadem et de libertatibus dicta intellegemus.

§ 233. The same rules apply to enfranchisements.

§ 234. Tutor uero an post mortem heredis dari possit quaerentibus eadem forsitan poterit esse quaestio quae de ⟨*eo*⟩ agitatur qui ante heredum institutionem datur.

§ 234. Whether a guardian can be nominated after the death of the heir, probably admits of the same divergence of opinion as whether he can be nominated before the appointment of the heir.

[DE POENAE CAVSA RELICTIS LEGATIS.]

§ 235. Poenae quoque nomine inutiliter legatur. poenae autem nomine legari uidetur quod coercendi heredis causa relinquitur, quo magis heres aliquid faciat aut non faciat; ueluti quod ita legatur SI HERES MEVS FILIAM SVAM TITIO IN MATRIMONIVM CONLOCAVERIT, X

§ 235. Penal bequests are void. A penal bequest is one intended to coerce the heir to some performance or forbearance. For instance, the following: 'If my heir give his daughter in marriage to Titius, let him pay ten thousand sesterces to Seius:' and the following: 'If thou do

⟨MILIA⟩ SEIO DATO, uel ita SI FILIAM TITIO IN MATRIMONIVM NON CONLOCAVERIS, X MILIA TITIO DATO; sed et si here*dem*, ⟨*si*⟩ uerbi gratia intra biennium monumentum sibi non fecerit, X ⟨*milia*⟩ Titio dar*e* iusserit, poenae nomine legatu*m est*; et deni|que ex ipsa definitione multas similes species—|——— possumus. Inst. 2, 20, 36.

not give thy daughter in marriage to Titius, do thou pay ten thousand sesterces to Titius:' and the following: 'If my heir does not, say, within two years build me a monument, I order him to pay ten thousand sesterces to Titius;' all these are penal bequests, and many similar instances may be imagined in accordance with the definition.

§ 236. Nec libertas quidem poenae | nomine dari potest, quamuis de ea re fuerit quaesitum.

§ 236. Freedom cannot be left as a penal bequest, although the point has been disputed.

§ 237. De tutore uero nihil possumus quaerere, quia non po*te*st datione tutoris heres conpelli quicquam facere aut non facere; ideoque ⟨———⟩ datur, poenae n*omi*ne tutor datus fuerit, magis sub condicione quam p*oe*nae nomine datus uidebitur.

§ 237. The nomination of a guardian cannot give rise to the question, because the nomination of a guardian cannot be a means of compelling an heir to any performance or forbearance, and a penal nomination of a guardian is inconceivable: if, however, a nomination were made with this design, it would be deemed rather conditional than penal.

§ 238. Incertae personae legatum inutiliter relinquitur. incerta autem uidetur persona quam per incertam opinionem animo suo testator subici*t*, ue*lut cum* ita legatum sit QVI PRIMVS AD FVNVS MEVM VENE*R*IT *EI HERES* MEVS X ⟨*MILIA*⟩ DATO. idem iuris est, si generaliter omnibus legauerit QVICVMQVE AD FVNVS MEVM VENERIT. i*n* eadem causa est quod ita relinquitur QVICVMQVE FILIO MEO IN MATRIMONIVM FILIAM SVAM CONLOCAVERIT, EI HERES MEVS X MILIA DATO. illud quoque [in eadem causa est] quod ita relinquitur QVI POS*T* TESTAMENTVM ⟨*SCRIPTVM PRIMI*⟩ CONSVLES DESIGNATI ERVNT, aeque incertis personis legari uidetur. et denique aliae multae huius-

§ 238. A bequest to an uncertain person is void. An uncertain person is one of whom the testator has no certain conception, as the legatee in the following bequest: 'Any one who comes first to my funeral, do thou, my heir, pay him ten thousand sesterces:' or a whole class thus defined: 'Every one who comes to my funeral:' or a person thus defined: 'Any one who gives his daughter in marriage to my son, do thou, my heir, pay him ten thousand sesterces:' or persons thus defined: 'Whoever after my will is made are the first consuls designate:' all these persons are uncertain, and many others that might be instanced. A bequest, qualified by a definite description, to an uncertain person is valid, as the following:

modi species sunt. sub certa uero demonstratione incertae personae recte legatur, ueluti EX COGNATIS MEIS QVI NVNC SVNT QVI PRIMVS AD FVNVS MEVM VENERIT, EI X MILIA HERES MEVS DATO.

Inst. 2, 20, 25.

'Of all my kindred now alive whoever first comes to my funeral, do thou, my heir, pay him ten thousand sesterces.'

§ 239. Libertas quoque non uidetur incertae personae dari posse, quia lex Fufia Caninia iubet nominat*i*m seruos liberari.

§ 239. Freedom cannot be bequeathed to an uncertain person, because the lex Fufia Caninia requires slaves to be enfranchised by name.

§ 240. Tutor quoque certus dari debet.

§ 240. An uncertain person cannot be nominated guardian.

§ 241. Postumo quoque alieno inutiliter legat*ur*. ⟨*Est*⟩ autem alienus postumus qui natus inter suos heredes testatori futurus non est. ideoque ex *e*mancipato *quo*que filio conceptus nepos extraneus post*umus est*; *item qui* in utero est eius quae *i*ure ciuili non intellegitur uxor, extraneus postumus patris intellegit*ur*. Inst. 2, 20, 26.

§ 241. An afterborn stranger cannot take a bequest: an afterborn stranger is one who on his birth will not be a self-successor to the testator: thus a grandson by an emancipated son is an afterborn stranger to his grandfather, and a child in the womb of one who is not regarded as a wife by civil law is an afterborn stranger to his father.

§ 242. Ac ne heres quidem potest institui postumus alienus; est enim incerta persona.

Inst. 2, 20, 28.

§ 242. An afterborn stranger cannot even be appointed heir, because he is an uncertain person.

§ 243. Cetera uero quae supra diximus ad legata proprie pertinent. quamquam non inmerito quibusdam placeat poenae nomine heredem institui non posse; nihil enim interest, utrum legatum dare iubeatur heres, si fecerit aliquid aut non fecerit, an coheres ei adiciatur, quia tam coheredis adiectione quam legati datione conpellitur, ut aliquid contra propositum suum faciat aut non faciat.

§ 243. Though what was said above of penal dispositions refers properly to bequests, yet a penal institution of an heir is justly considered by some authorities to be void, for it makes no difference whether a legacy is left away from an heir on his doing or failing to do something, or a co-heir is appointed, as the addition of a co-heir is as effective a means of coercion as the giving a legacy, to force an heir to do or not do something against his inclination.

§ 244. An ei qui in potestate sit eius quem heredem instituimus recte le*g*emus, quaeritur. Seruius recte legari putat, sed

§ 244. Whether a legacy can be lawfully left to a person in the power of the heir is a question. Servius holds that the bequest

euanescere legatum, si quo tempore dies legatorum cedere solet, adhuc in potes*tate* sit; ideoque siue pure legatum sit et uiuo testatore in potestate heredis esse desierit, siue sub condicione et ante condicionem id acciderit, deberi legatum. Sabinus et Cassius sub condicione recte legari, pure non recte, putant; licet enim uiuo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia quod nullas uires habiturum foret, si statim post testamentum factum decessisset testator, hoc ideo ualere quia *u*itam longius traxerit, absurdum ess*et*. *sed* diuersae scholae auctores nec sub condicione recte legari, quia quos in potestate habemus eis non magis sub condicione quam pure debere possumus. Inst. 2, 20, 32.

is valid, though it lapses if he continue under power at the date when the legacies vest; and whether the bequest is absolute and the legatee ceases to be subject to the power of the heir in the lifetime of the testator, or whether it is conditional and he is liberated before the condition is accomplished, in either case he holds the legatee entitled to the legacy. Sabinus and Cassius hold that a conditional bequest is valid, an absolute bequest invalid, because though the legatee may cease to be subject to the heir in the lifetime of the testator, yet the bequest must be deemed invalid because it would be absurd to hold that a disposition which would be void if the testator died immediately after making his will, can acquire validity by the mere prolongation of his life. The other school of jurists hold that even a conditional bequest is invalid, because a person under power is as incapable of having conditional as absolute legal claims against his superior.

§ 245. Ex diuerso constat ab eo qui in potestate ⟨*tua*⟩ est herede instituto recte tibi legari; sed si tu per eum heres extiteris, euanescere legatum, quia ipse tibi legatum debere non possis; si uero filius emancipatus aut seruus manumissus erit uel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.
Inst. 2, 20, 33.

§ 245. Conversely it is certain that if a person in your power is appointed heir, he can be charged with payment of a legacy to you; though if you inherit by his means the legacy fails, because you cannot be bound to pay yourself; but if your son is emancipated, or your slave manumitted or aliened, and either he himself becomes heir or he makes the person to whom he is alienated heir, you are entitled to the legacy.

§§ 229–236. The rules requiring that bequests should follow the institution of the heir, and should be limited to take effect in the lifetime of the heir, and prohibiting penal bequests, were abolished by Justinian, as may be seen by comparing the corresponding passages in his Institutes.

§ 238. Justinian abolished the rule prohibiting bequests to un-

certain persons, Cod. 6, 48. Corporations or Universitates are certae personae, not incertae as we might imagine from their mention in this constitution and elsewhere, the conception of a juristic person not being very distinctly formed by the Roman jurists. But though, as juristic persons, they were capable in general of property, yet, perhaps from a feeling of the impolicy of the principle of Mortmain, they were incapable of taking either hereditas or legatum. Cf. Ulpian, 22, 5 'Nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est, et neque cernere universi neque pro herede gerere possunt ut heredes fiant: senatusconsulto tamen concessum est, ut a libertis suis heredes institui possint. Sed fideicommissa hereditas municipibus restitui potest: denique hoc senatusconsulto prospectum est.' Leo, A.D. 469, made municipalities capable of taking an inheritance (hereditas), and by the legislation of Nerva and Hadrian all municipalities (civitates) had become capable of taking bequests (legatum), Ulpian, 24, 18. By Justinian's time Churches and Foundations as well as Municipalities had become capable of taking an inheritance or a legacy, but not corporations generally, except by special permission, Cod. 6, 24, 8. 1 §§ 197–200, comm.

§ 242. Although an afterborn stranger could not be appointed heir by the civil law, yet the praetor sustained such an appointment, and gave him the bonorum possessio. Justinian permitted him to take the hereditas, Inst. 3, 9 pr. After Justinian's legislation, Cod. 6, 48, but little remained of the once important disqualification of incerta persona except the rule, that a succession, testamentary or intestate, could not belong to a postumus alienus, unless he was begotten (conceptus) in the lifetime of the heritage-leaver.

§ 244. Dies legati cedens, or the time from which a legatee has an interest in the legacy, contingent on the inheritance being entered on, which in the event of his death is transmissible to his heredes, dated, as we have seen, in the time of Gaius from the opening of the testator's will: dies veniens, the acquisition of a legacy, dates from aditio of the heres. It does not require acceptance or even knowledge of the legacy, § 195. In reference to contracts these terms mean the date when an obligation vests and the date when payment may be exacted. On dies cedens an obligation is acquired: it forms part of the creditor's patrimony, and is capable of novation, cession, acceptilation: on dies veniens or actio nata, payment may be exacted and is recoverable by suit. The distinction between dies cedens and dies veniens in obligations arises when a dies adjecta or future date of performance is contained in the lex contractus.

A right to a conditional legacy vested when the condition was accomplished. Herein a conditional legacy differs from a conditional contract. A fulfilled condition of a contract or promise is retracted

to the date of the promise: i. e. the obligation of the promiser and the right of the promisee date from the conclusion of the contract as if it had been originally unconditional. Though an unconditional legacy was liable to be defeated by the heres declining the inheritance, or the will from any other cause failing of operation, yet, as soon as the validity of the will was ascertained by the aditio of the heres, the vesting of an unconditional legacy dated back from the opening of the will, or the death of the testator.

One of the Catos was the author of a maxim, that to test the validity of a legacy we must examine whether it would be valid if the testator died immediately after executing his will. This was called regula Catoniana, Dig. 34, 7, 1 pr. The retroactive effect of the removal of an original impediment to the validity of a title is called the convalescence of the title. Accordingly, Cato's rule may be described as a rule denying the convalescence of legacies. Cato's rule, however, was only a criterion of the validity of unconditional bequests; the validity of conditional bequests can only be tested when the condition is accomplished. Accordingly, of the three opinions mentioned in this paragraph, that of Sabinus is to be regarded as sound, and is so treated by Justinian, Inst. 2, 20, 32.

DE FIDEICOMMISSARIIS HEREDITATIBVS.

§ 246. *Nu*nc transeamus ad fideicommissa. Inst. 2, 23 pr.

§ 247. Et prius de hereditatibus uideamus. Inst. l. c.

§ 248. Inprimis igitur sciendum est opus esse, ut aliquis heres recto iure instituatur eiusque fidei committ*at*ur, ut eam hereditatem alii restituat; alioquin inutile est testamentum in quo nemo recto iure heres instituitur. Inst. 2, 23, 2.

§ 249. Verba autem [utilia] fideicommissorum haec [recte] maxime in usu esse uidentur PETO, ROGO, VOLO, FIDEI COMMITTO; quae proinde firma singula sunt, atque si omnia in unum congesta sint.

§ 250. Cum igitur scripserimus ⟨*L.*⟩ TITIVS HERES ESTO, possumus adicere ROGO TE L. TITI PETOQVE A TE, VT CVM PRIMVM POSSIS HEREDITATEM

§ 246. We now proceed to trusts.

§ 247. And to begin with trust inheritances.

§ 248. The first requisite is that an heir should be duly instituted and that it be committed to his trust to transfer the inheritance to another, for the will is void unless an heir is duly instituted.

§ 249. The words properly and commonly used to create a trust are: 'I beg, I request, I wish, I intrust;' and they are just as binding separately as united.

§ 250. Accordingly, when we have written: 'Lucius Titius, be thou my heir,' we may add: 'I request and beg thee, Lucius Titius, as soon as thou canst

MEAM ADIRE, C. SEIO REDDAS RESTITVAS. possumus autem et de parte restituenda rogare; et liberum est uel sub condicione uel pure relinquere fideicommissa, uel ex die certa.

Inst. l. c.

accept my inheritance, to convey and transfer it to Gaius Seius;' or we may request him to transfer a part. So again a trust may be either conditional or absolute, and to be performed either immediately or from a certain day.

§ 251. Restituta autem hereditate is qui restituit nihilo minus heres permanet; is uero qui recipit hereditatem aliquando heredis loco est, aliquando legatarii. Inst. 2, 23, 3.

§ 251. After the transfer of the inheritance the transferror nevertheless continues heir, while the transferree sometimes is in the position of an heir, sometimes in that of a legatee.

§ 252. Olim autem nec heredis loco erat nec legatarii, sed potius emptoris. tunc enim in *usu* erat ei cui restituebatur hereditas nummo uno eam hereditatem dicis causa uenire; et quae stipulationes ⟨*inter uenditorem hereditatis et emptorem interponi solent, eaedem interponebantur*⟩ inter heredem et eum cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo cui restituebatur hereditas, ut quidquid hereditario nomine condemnatus *sol*uisset, siue quid alias bona fide dedisse*t*, eo nomine indemnis *e*sset, et omnino si quis cum eo hereditario nomine ageret, ut recte defenderetur; ille uero qui recipiebat hereditatem inuicem stipulabatur, ut si quid ex hereditate ad heredem peruenisset, id sibi restitueretur, ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi.

§ 252. But formerly he was neither in the position of heir nor in that of legatee but rather in that of purchaser. Since in those times it was customary for the transferree of an inheritance to pay a sesterce as fictitious purchaser of it, and the stipulations appropriate to a vendor and purchaser of an inheritance were entered into by the heir and transferree, that is to say, the heir stipulated from the transferree that he should be indemnified for any sums he might be condemned to pay or might in good faith pay on account of the inheritance, and be adequately defended in any suit on account of the inheritance; and the transferree on the other hand stipulated that he should receive from the heir anything coming to the heir from the inheritance and be permitted to bring actions belonging to the heir as his cognitor or procurator.

§ 253. Sed posterioribus temporibus Trebellio Maximo et Annaeo Seneca consulibus senatusconsultum factum est, quo cautum est, ut si cui hereditas ex fideicommissi causa restituta sit, actiones quae iure ciuili

§ 253. But subsequently, in the consulate of Trebellius Maximus and Annaeus Seneca, a senatusconsult was passed providing that, when an inheritance is transferred in pursuance of a trust, the actions which the

heredi et in heredem conpeterent ⟨*ei*⟩ et in eum darentur cui ex fideicommisso restituta esset hereditas. per quod senatusconsultum desierunt illae cautiones in usu haberi. praetor enim utiles actiones ei et in eum qui recepit hereditatem quasi heredi et in heredem dare coepit, *ea*eque in edicto proponuntur. Inst. 2, 23, 4.

§ 254. Sed rursus quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur fideicommissa, po*s*t*ea* Pegaso et Pusione ⟨*consulibus*⟩ senatus censuit, ut ei qui rogatus es*s*et hereditatem restituere proinde liceret quartam partem retinere, atque e lege Falcidia in legatis retine*re* conceditur. (ex singulis quoque rebus quae per fideicommissum relincuntur eadem retentio permissa est.) per quod senatusconsultum ipse ⟨*heres*⟩ onera hereditaria sustinet. ille autem qui ex fideicommisso rel*i*quam partem hereditatis recipit legatarii partiarii loco est, id est eius legatarii cui pars bonorum legatur; quae species legati partitio vocatur, quia cum herede legatarius partitur hereditatem. unde effectum est, ut quae solent stipulationes inter heredem et partiarium legatarium interponi, ea*e*dem interponantur inter eum qui ex fideicommissi causa recipi*t* hereditatem et heredem, id est ut *e*t lucrum et damnum hereditarium pro rata parte inter eos commune sit. Inst. 2, 23, 5.

civil law allows to be brought by the heir or against the heir shall be maintainable by the transferree and against the transferree. Hence the old covenants were discontinued, and the Praetor used to give to and against the transferree as quasi heir the modified forms of action (utiles actiones) which are formulated in the edict.

§ 254. However, as heirs, when requested to transfer the whole or nearly the whole of an inheritance, declined for only a small or no benefit to accept the inheritance, which caused a failure of the trusts, the senate in the consulship of Pegasus and Pusio decreed, that an heir requested to transfer an inheritance should have the same right to retain a fourth of it as the lex Falcidia gives to an heir charged with the payment of legacies; and gave a similar right of retaining the fourth of any separate things left in trust. When this senatusconsult comes into operation, the heir bears the burdens of the inheritance and the transferree of the residue is on the footing of a partiary legatee, that is, of a legatee of a certain part of the estate under the kind of legacy called partition, because the legatee shares the inheritance with the heir. Accordingly the stipulations appropriate between an heir and partiary legatee are entered into by the heir and transferree, in order to secure a ratable division of the gains and losses arising out of the succession.

§ 255. Ergo siquidem non plus qua*m* dodrantem hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restituitur hereditas, *et* in utrumque actiones hereditariae pro rata parte dan*tur*, in heredem quidem iure ciuili, in eum uero qui recipit hereditatem ex senatusconsulto Trebelliano. quamquam heres etiam pro ea parte quam restituit heres perman*e*t eique et in eum solidae actiones conpetunt; sed non ulterius oneratur nec ulterius illi dantur actiones, quam apud eum commodum hereditatis remanet. Inst. 2, 23, 6.

§ 255. If then the heir is requested to transfer no more than three fourths of the inheritance the Sc. Trebellianum governs the transfer, and both are liable to be sued for the debts of the inheritance in ratable portions, the heir by civil law, the transferree by the Sc. Trebellianum: for though the heir even as to the transferred portion continues heir, and can, according to jus Civile, sue or be sued for the entire debts, his liabilities and rights of action are limited by the Sc. in the proportion of his beneficial interest in the inheritance.

§ 256. At si quis plus quam dodrantem uel etiam totam hereditatem restituere rogatus sit, locus est Pegasiano senatusconsulto. Inst. l. c.

§ 256. If more than three fourths or the whole is devised in trust to be transferred, the Sc. Pegasianum comes into operation.

§ 257. Sed is qui s*e*mel adierit hereditatem, si modo sua uoluntate adierit, siue retinuerit quartam partem siue noluerit retinere, ipse uniuersa onera hereditaria sustine*t*; sed quarta quidem retenta quasi partis et pro parte stipulationes interponi debent tamquam inter partiar*i*um legatarium et heredem; si uero totam hereditatem restituerit, ad exemplum emptae et uenditae hereditatis stipulationes interponendae sunt. Inst. l. c.

§ 257. And when once the heir has accepted, that is to say, voluntarily, whether he retains one fourth or declines to retain it, he bears the burdens of inheritance: but, if he retains a fourth, he should covenant with the transferree as quasi partiary legatee; if he transfers the whole, he should covenant with him as quasi vendee of an inheritance.

§ 258. Sed si recuset scriptus heres adire hereditatem ob id, quod dicat eam sibi suspectam esse quasi damnosam, cauetur *Peg*asiano senatusconsulto, ut desiderante eo cui restituere rogatus est, iussu praetoris adeat et restituat, proindeque ei et in eum qui receperit ⟨*here-*

§ 258. If an heir refuse to accept an inheritance from a suspicion that the liabilities exceed the assets, it is provided by the Sc. Pegasianum, that on the request of the transferree he may be ordered by the Praetor to accept and transfer; whereupon the transferree shall be

ditatem⟩ actiones dentur, ac iuris est ex senatusconsulto Trebelliano. quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui receperit hereditatem. Inst. l. c.

just as capable of suing and being sued as the transferree under the Sc. Trebellianum. In this case no stipulations are necessary, because the transferror is protected, and the hereditary actions pass to and against the transferree.

§ 259. Nihil autem interest utrum aliquis ex asse heres institu*tus* aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur; nam et hoc casu de quarta pa*r*te eius partis ratio ex Pegasi*a*no senatusconsulto haberi solet. Inst. 2, 23, 8.

§ 259. It makes no difference whether a person appointed as heir to the whole inheritance be requested to restore the whole or part of it, or whether a person appointed as heir to a share be requested to restore his whole share or only a part of it; for in this case also a fourth of the share to which he is appointed is taken into account under the Sc. Pegasianum.

§ 246. The dispositions of a testator which have been hitherto considered were directions addressed to his heir, resembling the orders of a father to his son or of a master to his slave, or the commands of a magistrate or of a legislator to his subjects. Hence the importance of the regular institution of an heir, of finding a person who, being a mere creature of the testator's, shall be compelled to execute his commands.

Fideicommissa, to which we now proceed, are not commands, but requests. Legatum est quod legis modo, id est, imperative, testamento relinquitur, nam ea quae precativo modo relinquuntur fideicommissa vocantur, Ulpian, 24, 1. 'A legacy is a legislative or imperative testamentary disposition: a precative disposition (a disposition in the form of entreaty) is a trust.'

The original object of trusts was to extend the testator's bounty to those who were legally incapacitated to be legatees; for instance, aliens and Latini Juniani; and though Hadrian subsequently incapacitated aliens for taking the benefit of a trust, § 285, yet, as declarations of trust were exempt from many other restrictions which hampered direct legacies, they survived the circumstance which was the principal motive of their introduction, cf. §§ 260-289. For instance, another object of the declaration of trusts was to avoid the restrictions imposed by the lex Falcidia on the amount of legacies bequeathable to legatees who were capable of taking (had capacitas as well as testamenti factio passiva), § 254, and this object

would continue to operate as a motive for the employment of trusts even after the invalidation of trusts in favour of peregrini, till it was defeated by the Sc. Pegasianum. Or again, a limitation to take effect after the death of heres, § 277, or a charge by means of codicilli on the intestate heir, which were not recognized by civil law, remained valid as trusts.

That trusts had originally no legal validity, we see from Cicero, Verres, 2, 1, 47, where we learn that it was usual for the testator to make the heir take an oath to perform the testator's wishes, thus supplying by religious motives the want of a political sanction. But Augustus, as we are informed by Justinian, Inst. 2, 23, 1, in some individual cases of breach of trust directed the consuls to interpose their authority and compel trustees to execute their charge; and trusts soon became an ordinary mode of testamentary disposition, and, in process of time, a permanent fiduciary jurisdiction was established, the court of a special praetor fideicommissarius.

Originally if a testator wished to leave to a certain person the net amount of his fortunes, unsaddled with the burden and risk of administration, he instituted another as heres, whose sole function was the satisfaction of creditors and the discharge of the other duties of administration: and bequeathed the net residue of his patrimony to the real object of his bounty as legatee (legatarius). When this course was restricted by the lex Falcidia, a testator who wished a certain object of his bounty to receive the whole of his patrimony free from burdens would institute another person as heres, subject to a trust to transfer the whole of the inheritance, after payment of debts and perhaps with some remuneration for his trouble, to the real beneficiary (fideicommissarius). At first the testator could only rely on the honour of the heres, for these trusts were not legally binding; and not long after they became legally binding they were subjected by Sc. Pegasianum, under the Emperor Vespasian, to the same restrictions as were imposed on legacies. Sc. Trebellianum, under Nero, had placed the person to whom the inheritance was transferred in exactly the same position as the heir (heredis loco), to whom the Falcidian abatement was of course inapplicable. Sc. Pegasianum, to subject fideicommissarius to this abatement, for the benefit of heres fiduciarius, gave the latter the option of treating him as if he were legatarius. Thus the advantage of having a disinterested Executor, of leaving the testator's wishes to be carried into effect by a person not, like the heir or one loco heredis, himself interested in the distribution; an advantage which an English testator may, if he chooses, secure, was deliberately sacrificed by the Roman legislator.

Another method of leaving to a person the net value of an inheritance without the troubles of administration, viz. the insti-

tution of the slave of the person whose benefit was intended, has already been noticed. § 189, comm.

The conversion of a moral into a legal obligation by the legalization of trusts was similar to what occurred when, under the Twelve Tables, legal force was given to the mancipatio cum fiducia, declaring the conditions and purposes of a remancipation, 2 § 60; and, remembering the celebrated ordinance, Cum nexum faxit mancipiumque, uti lingua nuncupassit, ita jus esto, it may occur to us to wonder why Augustus did not imitate the energetic brevity of the ancient legislator, and simply enact, Cum testamentum faxit codicillosve, uti fideicommiserit, ita jus esto. There would then have been no need of the cumbrous machinery of fictitious sales and stipulations between quasi vendor and quasi vendee; but a little reflection will show that such an enactment would have operated very inconveniently, and have defeated the very purposes for which trusts were instituted. Such an enactment would have made trusts, like nuncupations, a matter of civil law; and the jus strictum of the civil law was far from elastic or rational even in the time of Augustus; so that, if it was intended to enlarge the powers of testators and the discretion of the fiduciary tribunal, it was absolutely necessary to make trusts a province not of legal but of equitable jurisdiction.

§ 251. The transferree, it will be seen, was quasi heir when the Sc. Trebellianum applied: when the Sc. Pegasianum applied he was either quasi legatee or quasi vendee.

§ 252. These stipulations were employed because the fictitious sale (dicis causa, nummo uno) of the inheritance produced no universal succession, and so did not transfer the liability. But after Antoninus Pius these stipulations were not required in case of an actual sale of an inheritance, for though this did not operate as a universal succession, it involved a cession of actions. Dig. 2, 14, 16; cf. Dig. 18, 4, Cod. 4, 39.

§ 253. The terms of the Sc. Trebellianum, passed in the reign of Nero, probably A. D. 57, are given in the Digest 36, 1, 1 and 2. 'Forasmuch as equity requires that whenever an inheritance is left in trust, any actions arising thereout should be brought against the transferree of the inheritance or by him, rather than that the fiduciary heir should incur any risk in consequence of his trust; it is decreed that the actions of and against an heir, shall not be granted to or against an heir who transfers a succession in pursuance of a trust, but to and against the testamentary transferree, in order that in future the last wishes of testators may have more effect.' It is strange that the lawgiver should have stooped to the use of fiction (actio utilis), the natural instrument of a magistrate timidly usurping legislative

power. Bethmann-Hollweg, § 96, suggests that actio utilis was in this case not actio fictitia but actio in factum concepta. (Cf. Lenel xv. 68.)

§ 254. By the Sc. Trebellianum, if the whole beneficial interest in an inheritance was transferred, the whole right of suing and being sued passed to the transferree: if only a portion of the beneficial interest was transferred, both the transferror and the transferree could sue and be sued in the same proportion. But if the whole or almost the whole inheritance is to be transferred to another the heir has little or no inducement to enter upon it, on which account the trust may fail with the other provisions of the will. Hence the Sc. Pegasianum, passed in the reign of Vespasian, A. D. 70–76, apparently provided that when less than a fourth of the inheritance is left to the benefit of the fiduciary heir, he should still be entitled to retain his fourth, the Sc. Trebellianum being then inoperative, that is to say, that in such a case the actions by or against the inheritance shall not be maintainable by or against both the heir and the transferree in the proportion of their interests, but should be exclusively maintainable by or against the heir. In fact, having subjected the transferree to the liability of abatement which the lex Falcidia imposed on the legatee, it seemed logical to put him in all other respects on the footing of a legatee, or singular successor, including the immunity from being sued and incapacity of suing for the debts of the succession. If then the fiduciary heir, retaining his fourth, became thus sole administrator, the Sc. Pegasianum directed him and the transferree to enter into the covenants usual between an heir and a partiary legatee. The heir promised, in the event of an underestimate, to make an additional payment; and the transferree promised, in the event of an overestimate, to make a proportional repayment. A partiary legatee is a legatee by partition, which Theophilus calls a fifth form of legacy, and of which Ulpian gives the formula, 24, 25. 'As single things can be bequeathed, so can a universality, for instance thus: Do thou, my heir, partition and divide my inheritance with Titius; in which case a moiety is deemed to be bequeathed, but any other part, a third or fourth, may be bequeathed, and this form of bequest is called partition.' This form of legacy probably owed its origin to the lex Voconia, § 226, which forbade Classicus to make an heiress.

§§ 257, 258. The subject is not very clearly explained by Gaius, but it would seem that after the Sc. Pegasianum was passed, the principle of the Sc. Trebellianum continued to apply, if as much as a quarter of the estate was reserved to the heir by the testator; thus the inheritance with its rights and duties would be divided pro parte between the heir and the transferree. But if the heir was left less than one fourth, his relation to the transferree, if he accepted the

inheritance, was determined by the Sc. Pegasianum. In such circumstances he might enter on the inheritance and deduct a fourth, or if he chose to carry out the trust implicitly enter without making this deduction. But in the latter case, as well as in the former, the law treated him not as an heir but as a legatee, which made the old stipulations still necessary.

However Modestinus recommended, as the safer course if the heir declined to avail himself of his right to the fourth, that he should feign unwillingness to accept a damnosa hereditas, and should make a compulsory acceptance by the order of the praetor, § 258, in which case the actions are transferred in totality to the transferree by the express provision of the Sc. Pegasianum, Dig. 36, 1, 47. The sequence of §§ 257, 258 seems to indicate an intention of Gaius to suggest that this course might be adopted.

The requirement for form's sake of a compulsory aditio and restitutio, instead of making the hereditas vest immediately under the will in the fideicommissarius (the course pursued by the legislator in the English statute of Uses and Trusts), has already, 1 §§ 189–193, been noticed as characteristic of Roman jurisprudence. It had this inconvenience, that it permitted the trusts to be defeated by the death or absence, malicious (dolo malo) or involuntary, of the heres fiduciarius. No remedy was provided for this contingency till the time of Justinian, who enacted that in such a case the inheritance should vest in the fideicommissarius by mere operation of law (ipso jure). Sancimus itaque ut sive per contumaciam afuerit is cui restitutio imposita est, sive morte praeventus nullo relicto successore fuerit, sive a primo fideicommissario in secundum translatio celebrari jussa est, ipso jure utiles actiones transferantur, Cod. 6, 49, 7, 1 *b*.

§ 259. The stipulations of the transferree as quasi vendee or quasi partiary legatee required by the Sc. Pegasianum were not only a cumbrous machinery, but after all afforded an insufficient security to the parties. The heir and transferree were always in mutual danger of one another's insolvency, and an heir after transferring the whole inheritance, though not fairly liable to any molestation or vexation on account of it, might find himself with two lawsuits on his hands: he might first be sued by the creditors of the estate, and then have to recover back what he is condemned to pay them from the transferree by suing him on the covenants of quasi vendor and quasi vendee.

It is not surprising therefore, that Justinian abolished these provisions of the Sc. Pegasianum, and enacted that in every case there shall be a transfer or division of actions as contemplated by the Sc. Trebellianum, i. e. that the actions by or against the in-

heritance shall either be transferred in totality to the transferree, or be maintainable by or against both the heir and the transferree in the proportion of their interests. See Inst. 2, 23, 7.

The following observations may serve to complete the explanation of the Sc. Trebellianum and the Sc. Pegasianum.

Succession is the transfer of a right from one person (auctor) to another person (successor), such as occurs, for instance, in the conveyance or alienation of property. Here the same right of ownership that was previously vested in the alienor is subsequently vested in the alienee. The right continues the same; the person invested therewith is changed. It was characteristic of obligatio; a relation between two determinate persons (before, at least, the comparatively modern invention of papers payable to the holder and transferable by delivery) that it was not capable of a similar alienation. All that could be done to accomplish a similar result was to employ one of two processes, Novation or Cession of Action, § 38. 3 §§ 155-162, comm. In these procedures there is strictly speaking no Succession, for in Novation the transferree is not invested with the same right that previously vested in the transferror, but a new right is created in the transferree while the old right of the transferror is extinguished: and in Procuration or Cession the right still continues nominally in the transferror, as representative of whom the transferree recovers it or enforces it by action, retaining for himself what is recovered.

This inalienability of obligations, however, was confined to SINGULAR successions (in singularum rerum dominium successio): UNIVERSAL succession (per universitatem successio) or the transmission of the ideal whole of a patrimony, of which we have an example in hereditas testamentary or intestate, differed from SINGULAR succession by the capacity of passing obligation as well as Dominion. The heres of the testator or intestate sued and was sued in his own name on the obligations, active or passive, that originally vested in the deceased. But UNIVERSAL succession was an institution only recognized by Roman jurisprudence in certain definite cases. It was a formidable operation and rigorously circumscribed. It was not a transaction that the law allowed to be accomplished at the discretion of individual parties in pursuance of private convention. It was only admitted in the cases enumerated by Gaius, § 98, and, without legislative interference, the list could not be augmented.

These difficulties in the transfer of obligation opposed a great obstacle to the transfer (restitutio) of trust successions: and these difficulties were partially removed by the Sc. Trebellianum, and more completely by Justinian, by investing the Restitutio with the

character of successio per universitatem, in other words, by the legislative sanction of a new instance of UNIVERSAL succession.

The following observations may illustrate the joint operation of the laws concerning Trusts and the lex Falcidia under the law of Justinian. Although the fideicommissarius or person to whom an inheritance or a portion thereof is directed to be transferred (restitui) is charged like a coheres with the legacies in proportion to the quota which he takes, he has not like the heres a right of deducting from the legacies with which he is charged, and retaining for himself a Falcidian portion or fourth of his quota. His rights against the legatee depend on the question whether the testator in directing the transfer, or in other words creating the trust, used either expressly or by implication the terms deductis legatis, 'after deduction of legacies,' a clause favouring the legatees; or whether, in giving the legacies, he used terms charging them on the inheritance (si ad heredis onus esse testator legata dixerit); which would imply that the cestui que trust was to be exactly assimilated to the legatees. The following examples will illustrate the working of the law.

A testator owning 400 (sestertia, or any other units) leaves all to A as his sole heres, but directs him as trustee (fiduciarius) to convey half the inheritance to B (fideicommissarius), and leaves a legacy of 200 to C. The effect is that C receives 100 from A and 100 from B. Dig. 36, 1, 1, 20.

But suppose the testator left a legacy of 400 to C. Then C will receive 200 from B who has no right of retaining anything, and 100 from A, who is entitled to retain for himself one fourth of his inheritance, i. e. the 100 that remain.

Questions, however, requiring special treatment may arise in the following cases:—(1) If an heir is charged to transfer the whole of an inheritance and the legacies are added to his charge (si ad heredis onus esse testator legata dixerit), the interests of both the legatee and transferree undergo, if necessary, a proportional reduction. For instance a testator, proprietor of 400, makes A his sole heres, but requests him to transfer the whole succession to B, and gives a legacy of 300 to C, making use of the above-mentioned terms. The result is that A, the heres, retains 100 as his Falcidian fourth, and the remaining 300 are distributed between B the cestui que trust and C the legatee, in the proportion of 4 to 3; that is to say, the cestui que trust takes $\frac{4}{7}$ or $171\frac{3}{7}$, and the legatee takes $\frac{3}{7}$ or $128\frac{4}{7}$. Dig. 36, 1, 3 pr.

(2) If the testator directs the heir to transfer the whole of the inheritance 'after deduction of the legacies' (deductis legatis), the transferree bears the whole burden of the legacies, and only keeps what remains after full payment of the legatee, subject to this

proviso, that, though a transferree is generally not entitled to a Falcidian fourth, yet if a transferree who has to bear the burden of legacies receives the inheritance reduced by the Falcidian fourth of the heres, he is himself entitled to reduce proportionally the legacies and retain a fourth thereof for himself. Dig. 35, 1, 43, 3; 35, 2, 32, 4. E. g. a testator, proprietor of 400, makes A his sole heres, requesting him to transfer the whole inheritance to B after deduction of legacies, and leaves a legacy of 300 to C. The result is that the heir retains $\frac{1}{4}$ (100); and the remaining 300 is distributed between the legatee and transferree, the legatee taking 300 reduced by $\frac{1}{4}$ (225), and the transferree taking that $\frac{1}{4}$ (75). The same effect would have been produced if the testator, instead of using the clause deductis legatis, had simply charged the legacies on the fideicommissarius. Or the rights of the fideicommissarius may be calculated with the same result by the following method. The heres retains $\frac{1}{4}$ and transfers $\frac{3}{4}$ to the cestui que trust, who under Justinian's legislation is no longer a partiary legatee as he was under the Sc. Pegasianum, but a sharer of the inheritance with the heres in the proportion of $\frac{3}{4}$ to $\frac{1}{4}$. The legatee is entitled to 300 from these co-heirs in the proportion of their shares of the inheritance. The heres, however, is protected by the lex Falcidia, and thus $\frac{1}{4}$ of the legacy is lost to the legatee: he obtains, however, $\frac{3}{4}$ (225) from the transferree, who retains for himself the remaining $\frac{1}{4}$ (75).

(3) If the heres makes voluntary aditio, but does not retain the Falcidian fourth to which he is entitled, then, if the legacy was charged on the inheritance, the whole inheritance is divided between the transferree and legatee in the proportion of 4 to 3: that is, the transferree obtains altogether $228\frac{4}{7}$ and the legatee $171\frac{3}{7}$.

(4) If the legacy was expressly charged on the fideicommissarius, or if there was no express clause defining whether it was charged on him or on the heres, then the legatee will benefit by the heres abstaining from his fourth: and the transferree will only get what remains after full payment of the legacy. Thus, in the circumstances we have assumed, the legatee will get 300 and the transferree 100.

(5) If the heres abstains from his $\frac{1}{4}$ expressly in favour of the transferree, the latter alone gets the benefit of such abstention.

(6) If the heres only makes compulsory aditio, he takes no share of the Falcidian fourth, which all goes to the account of the transferree who compelled the heres to make aditio. Dig. 36, 1, 2.

(7) If the heres has to transfer the whole but has received his Falcidian fourth in the shape of legacies, the transferree has to satisfy the other legatees: and if he cannot pay the whole of their

legacies they may recover from the heres all that he receives beyond his fourth.

(8) If the heres is directed to transfer not the whole but ¾ of the inheritance, the transferree has to satisfy the legatees, but deducts and retains for himself ¼ of their legacies, as he would under the circumstances supposed in (3). Vangerow, § 559.

§ 260. Potest autem quisque etiam res singulas per fideicommissum relinquere, uelut fundum hominem uestem argentum pecuniam, et uel ipsum heredem rogare, ut alicui restituat, uel legatarium, quamuis a legatario legari non possit.
Inst. 2, 24, pr.

§ 260. Not only an inheritance, but also single things, may be bequeathed by way of trust, as land, a slave, a garment, plate, money; and the trust may be imposed either on an heir or on a legatee, although a legatee cannot be charged with a legacy.

§ 261. Item potest non solum propria testatoris res per fideicommissum relinqui, sed etiam heredis aut legatarii aut cuiuslibet alterius. itaque et legatarius non solum de ea re rogari potest, ut eam alicui restituat quae ei legata sit, sed etiam de alia, siue ipsius legatarii siue aliena sit. [sed] hoc solum obseruandum est, ne plus quisquam rogetur aliis restituere, quam ipse ex testamento ceperit; nam quod amplius est, inutiliter relinquitur.
Inst. 2, 24, 1.

§ 261. Again not only the testator's property, but that of the heir, or of a legatee, or that of any stranger, may be left by way of trust. Thus a legatee may be charged with a trust to transfer either a thing bequeathed to him, or any other thing belonging to himself or to a stranger; provided always that he is not charged with a trust to transfer more than he takes under the will, for in respect of such excess the trust would be void.

§ 262. Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est aut ipsam redimere et praestare, aut aestimationem *eius* soluere, *sicut iuris est, si* per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum relictam dominus non uendat, extingui fideicommissum; sed aliam esse causam per damnationem legati. Inst. l. c.

§ 262. When a stranger's property is bequeathed by way of trust, the trustee must either procure and convey the specific thing or pay its value, like an heir charged under a bequest by condemnation; though some hold that the owner's refusal to sell avoids such a trust, though it does not avoid a bequest by condemnation.

§ 263. Libertas quoque seruo per fideicommissum dari potest,

§ 263. Liberty can be left to a slave by a trust charging either

ut uel heres rogetur manumittere uel legatarius.

Inst. 2. 24, 2.

§ 264. N*ec interest utrum de suo proprio* seruo testator roget, an de eo qui ipsius heredis aut legatarii uel etiam extranei sit. Inst. l. c.

§ 265. Itaque et alienus ser*u*us redimi et manumitti debet. quodsi dominus eum non uendat, sane extinguitur fideicommissaria libertas, quia hoc *casu* pretii conputatio nulla interuenit. Inst. l. c.

§ 266. Qui autem ex fideicommisso manumittitur, non testatoris fit libertus, etiamsi testatoris seruus *fuerit*, sed eius qui man*umit*tit. Inst. l. c.

§ 267. At qui directo testamento liber esse iubetur, uelut hoc modo STICHVS SERVVS ⟨*MEVS*⟩ LIBER ESTO, uel hoc STICHV*M* SERVVM MEVM LIBERVM ESSE IVBEO, *is ipsius testa*toris fit libertus. nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris ex iur*e Quiritium fuerit, et quo faceret* testamentum et qu*o* moreretur. Inst. l. c.

§ 268. Multum autem diff*erunt ea* quae per fideicommissum rel*incun*|tur ab his qu*ae* directo iure legantur.

§ 269. Nam ecce per fideicommissum *etiam* —|— heredis relinqui potest; cum alioquin legatu*m* —|—— inutile sit.

§ 270. | Item intestat*us* moriturus potest ab eo ad quem bona eius pertinent fideic*ommissum* alicui relinquere; cum alioquin ab eo legari non possit.

an heir or a legatee with his manumission.

§ 264. And it makes no difference whether the slave is the testator's own property, or that of the heir himself, or of the legatee, or even that of a stranger.

§ 265. A stranger's slave, therefore, must be purchased and manumitted, but his owner's refusal to sell extinguishes the gift of liberty, because liberty admits of no valuation in money.

§ 266. A trust of manumission makes the slave the freedman, not of the testator, though he may have been the owner of the slave, but of the manumitter.

§ 267. A direct bequest of liberty, such as: 'Be my slave Stichus free,' or, 'I order that my slave Stichus be free,' makes the slave the freedman of the testator. A direct bequest of liberty can only be made to a slave who is the testator's quiritarian property at both periods, both at the time of making his will and at the time of his decease.

§ 268. There are many differences between trust bequests and direct bequests.

§ 269. Thus by way of trust a bequest may be charged on the heir of the heir, whereas such a bequest made in any other form is void.

§ 270. Again, a man going to die intestate can charge his heir with a trust, but cannot charge him with a legacy.

§ 270 *a*. *Item legatum codicillis* relictum non aliter ualet, quam si a testatore confirmati fuerint, id est nisi in testamento caue*rit* testator, ut quidquid in codicillis scripserit id ratum sit; fideicommissum uero etiam non confirmatis codicillis relinqui potest.

§ 270 *a*. Again, a legacy left by codicil is not valid, unless the codicil has been confirmed by the testator, that is, unless the testator has provided in his will that anything written in his codicil is ratified: whereas a trust requires no ratification of the codicil.

§ 271. Item a legatario legari non potest; sed fideicommissum relinqui potest. quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possumus.

§ 271. A legatee too cannot be charged with a direct legacy, but can be the subject of a trust, and the beneficiary of a trust may himself be charged with a further trust.

§ 272. Item seruo alieno directo libertas dari non potest; *sed* per fideicommissum potest.

§ 272. So also a slave of a stranger cannot be enfranchised by direct bequest, but may by the interposition of a trust.

§ 273. Item codicillis nemo heres instit*u*i potest neque exheredari, quamuis testamento confirmati sint. *a*t is qui testamento heres institutus est potest codicillis rogari, ut eam hereditatem alii totam uel ex parte restituat, quamuis testamento codicilli confirmati non sint.

§ 273. A codicil is not a valid instrument for the institution of an heir or for his disinheritance, though it is ratified by will: but an heir instituted by will may be requested by a codicil to transfer the inheritance in whole or in part to another person without any ratification by will.

§ 274. Item mulier quae ab eo qui centum milia aeris census est per legem Voconiam heres instit*u*i non potest, tamen fideicommisso relictam sibi hereditatem capere potest.

§ 274. A woman who cannot by the lex Voconia be instituted heiress by a testator registered in the census as owning a hundred thousand sesterces, can nevertheless take an inheritance bequeathed to her by way of a trust.

§ 275. Latini quoque qui hereditates legataqu*e* directo iure lege Iunia capere prohibentur ex fideicommisso capere possunt.

§ 275. And Latini Juniani, who are disabled by the lex Junia from taking an inheritance or legacy by direct bequest, can take it by means of a trust.

§ 276. Item cum senatusconsulto prohibitum sit proprium seruum minorem annis XXX liberum et heredem instituere, plerisque placet posse nos iubere liberum esse, cum annorum XXX

§ 276. Again a decree of the senate (rather, the lex Aelia Sentia 1 § 18) incapacitates a testator's slave under thirty years of age from being enfranchised and instituted heir; but, according

erit, et rogare, ut tunc illi restituatur hereditas.

to the prevalent opinion, he can be ordered to be free on attaining the age of thirty, and the heir may be bound by way of trust to transfer the inheritance to him on that event.

§ 277. Item quamuis non ⟨*possimus*⟩ post mortem eius qui nobis heres extiterit alium in locum eius heredem instituere, tamen possumus eum rogare, ut cum morietur alii eam hereditatem totam uel ex parte restituat. et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus CVM TITIVS HERES MEVS MORTVVS ERIT, VOLO HEREDITATEM MEAM AD P. MEVIVM PERTINERE. utroque autem modo, tam hoc quam illo, Titius heredem *su*um obligatum relinqui*t* de fideicommisso restituendo.

§ 277. An heir cannot be instituted after the death of a prior heir, but an heir may be bound by way of trust to transfer the inheritance, when he dies, in whole or in part to another person; or, as a trust may be limited to take effect after the death of the heir, the same purpose may be accomplished in these terms: 'When my heir is dead, I wish my inheritance to go to Publius Mevius;' and whichever terms are employed, the heir of my heir is bound by a trust to transfer the inheritance to the person designated.

§ 278. Praeterea legata ⟨*per*⟩ formulam petim*us*; fideicommissa uero Romae quidem apud consulem uel apud eum praetorem qui praecipue de fideicommissis ius dicit persequimur, in p*ro*uinciis uero apud praesidem prouinciae.

§ 278. Legacies, moreover, are recovered by the formulary procedure; but trusts are enforced by the extraordinary jurisdiction of the consul or praetor fideicommissarius at Rome; in the provinces by the extraordinary jurisdiction of the president.

§ 279. Item de fideicommissis semper in urbe ius dicitur; de legatis uero, cum res agun*tur*.

§ 279. Cases of trust are heard and determined at Rome at all times of the year; cases of legacy can only be litigated during the trial term.

§ 280. Item fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit; legatorum uero usurae non debentur; idque rescripto diui Hadriani significatur. scio tamen Iuliano plac*u*isse, in eo legato quod sine*n*di modo relinquitur idem iuris esse quod in fideicommissis; quam sententiam et his temporibus magis optinere uideo.

§ 280. Trusts entitle to payment of interest and interim profits on delay of performance (mora) by the trustee; legatees are not entitled to interest, as a rescript of Hadrian declares. Julianus, however, held that a legacy bequeathed in the form of permission is on the same footing as a trust, and this is now the prevalent doctrine.

§ 281. Item legata Graec*e* scripta non ualent; fideicommissa uero ualent.

§ 281. Bequests expressed in Greek are invalid; trusts expressed in Greek are valid.

§ 282. Item si legatum per damnationem relictum heres infit*i*etur, in duplum cum *e*o agitur; fideicommissi uero nomine semper in simplum persecutio est.

§ 282. An heir who disputes a legacy in the form of condemnation is sued for double the sum bequeathed; but a trustee is only suable for the simple amount of the trust.

§ 283. Item ⟨*quod*⟩ quisque ex fideicommisso plus debito per errorem soluerit, repetere potest; at id quod ex causa falsa per damnationem legati plus debito solutum sit, repeti non potest. idem scilicet iur*i*s est de eo [legato], quod non debitum uel ex hac uel ex illa causa per errorem solutum fuerit.

§ 283. On overpayment by mistake in the case of a trust, the excess can be recovered back by the trustee; but on overpayment from some mistaken ground of a bequest by condemnation, the excess cannot be recovered back by the heir; and the law is the same in the case of what is not due at all, but which has been paid by some mistake or other.

§ 284. Erant etiam aliae differentiae, quae nunc non sunt.

§ 284. There formerly were other differences which no longer exist.

§ 285. Vt ecce peregrini poterant fide*i*commiss*a* ca*p*ere; et fe*r*e hae*c* fuit origo fide*i*commiss*orum*. sed postea id prohibitum est; et nunc ex oratione diu*i* Hadriani senatusconsultu*m* factum est, ut ea fide*i*commissa fisco uindicarentur.

§ 285. Thus aliens could take the benefit of a trust, and this was the principal motive in which trusts originated, but afterwards they were incapacitated; and now, by a decree of the senate passed on the proposition of Hadrian, trusts left for the benefit of aliens may be claimed by the fiscus.

§ 286. Caelibes quoque, qui per legem Iulia*m* hereditates legataque capere prohibentur, olim fideicommissa uideba*n*tur capere posse.

§ 286. Unmarried persons, who are disabled by the lex Julia from taking inheritances or legacies, were formerly deemed capable of taking the benefit of a trust.

§ 286 *a*. Item orbi, qui per legem Papia*m* [ob id quod liberos non habebant] dimidias partes heredita*t*um legatorumque perdunt, olim solida fideicommissa uidebantur capere posse. sed postea senatusconsulto Pegasiano p*r*oinde fideicommissa quoque ac legat*a* heredit*at*esque capere poss*e* prohibiti sunt; eaque translata

§ 286 *a*. And childless persons, who forfeit by the lex Papia, on account of not having children, half their inheritances and legacies, were formerly deemed capable of taking in full as beneficiaries of a trust. But at a later period the Sc. Pegasianum extended to trust dispositions the rules which attach to legacies and inheritances, transferring the trust property to

sunt ad eos, qui ⟨*in eo*⟩ testamento liberos habent, aut si null*us* liberos habeb*it*, ad populum, sicut *i*uris est in legatis et in hereditatibus, quae eadem aut simil*i* ex cau⟨*sa caduca fiunt*.

§ 287. *I*⟩tem olim incertae personae uel postumo alieno per fideicommissum relinqui poterat, quamuis neque heres institui neque legari ei poss*et*; sed senatusconsulto, quod auctore di*uo* Hadriano factum est, id*em* in fideicommissis quod in legatis hereditatibusque constitutum est.

§ 288. Item poenae nomine iam non dubitatur nec per fideicommissum quidem relinqui posse.

§ 289. Sed quamuis *in* mult*is* iuris partibus longe latior causa sit fideicommissorum quam eorum quae directo relincuntur, in quibusdam tantumdem uale*a*nt, tamen tutor non aliter testamento dari potest quam directo, ueluti hoc modo LIBERIS MEIS TI*TI*VS TVTO*R* ESTO, uel ita LIBERIS MEIS TITIVM TVTOREM DO; per fideicommissum *uero dari* non potest.

those mentioned in the will who have children, and failing these to the people (aerarium), as happens to legacies or inheritances which on the same or similar grounds become 'caduca.'

§ 287. So too, at one time, an uncertain person or an afterborn stranger could take the benefit of a trust, though he could neither take as heir nor as legatee, but a decree of the senate, passed on the proposition of the emperor Hadrian, made the law in this respect relating to legacies and inheritances applicable also to trusts.

§ 288. It is now clear that trusts cannot be left with the object of inflicting a penalty.

§ 289. Although in many branches of law trusts have an ampler scope than direct dispositions, while in others they are on a par, yet a testamentary guardian can only be appointed by direct nomination, as thus: 'Be Titius guardian to my children;' or thus: 'I nominate Titius guardian to my children;' he cannot be appointed by way of trust.

§ 265. Justinian declares that the heir is not forthwith released from his obligation by the owner's refusal to sell, but will be bound to seize any opportunity that may subsequently offer of purchasing and manumitting the slave in pursuance of the trust, Inst. 2, 24, 2.

§ 270 *a*. Codicils, as well as fideicommissa, according to Justinian, first acquired legal validity in the time of Augustus, who, being trustee under a codicil, set the example of performing the trust. The jurist Trebatius being consulted by Augustus, whether it was possible to give legal force to codicils without defeating the policy of testamentary law, gave a decided opinion in the affirmative; and all scruples respecting the validity of codicils vanished when it became known that codicils had been left by the eminent jurist Labeo, Inst. 2, 25, pr.

Codicillus is the diminutive of codex, and denotes the less important and solemn documents or instruments of a man of business, a pocket-book, an agenda, a codicil; as codex denotes the more important and formal documents, a journal, a ledger, a will. A codicil enabled a testator who had solemnly executed a will to add to or modify its dispositions without the necessity of re-execution. It was usual in a will to ratify any prior or subsequent codicils; a codicil, however, might exist without any will. An informal will could only take effect as a codicil if such was the expressed intention of the testator. A codicil could not contain an institution or disinheritance or substitution; but it might contain a trust for the transfer of the whole of an inheritance: and though a codicil could not contain a disinheritance, yet we have seen (§§ 147–151, comm.) that a codicillary declaration that the heir was unworthy produced confiscation or ereption of the inheritance for indignitas. A testator could only leave a single will, for a later will revoked a former; but he might leave many codicils. A codicil needed no formalities, though Justinian required the attestation of five witnesses, not, however, as an essential solemnity, but as a means of proof: for, in the absence of five witnesses, the heir might be required to deny the existence of a trust upon his oath, Inst. 2, 23, 12. The admission of codicils was a departure from the rule requiring a unity in the act of testation. The concentration of his last will in a single act disposing simultaneously of all his property was no longer required of the testator. He now might distribute his fortune by way of legacy in a series of fragmentary or piecemeal and unrelated dispositions.

§ 278. Fideicommissa were enforced by persecutio, or the praetor's extraordinaria cognitio, 4 § 184, comm.

§ 279. The law terms at Rome during the greater part of the formulary period, were of two different kinds: (1) the juridical term or term for jurisdictio, and (2) the judicial term or term for trials.

(1) The term for jurisdiction, that is, for the solemn acts of the praetor sitting on the tribunal in his court in the comitium, was that originally prescribed for the ancient legis actiones. The year was divided into forty dies fasti, unconditionally allotted to juridical proceedings, one hundred and ninety dies comitiales, available for juridical purposes unless required for the legislative assemblies, dies intercisi, of which certain hours were available for jurisdiction, and sixty dies nefasti, which were absolutely unavailable for juridical proceedings.

(2) Judicia, or trials before a judex in the forum, were unaffected by dies fasti and nefasti, but dependent on another division, dies festi and profesti: dies festi (days devoted to feriae, ludi, epulae,

sacrificia) being exempted from litigation. Besides these occasional interruptions of litigation, there were longer set vacations, which we find rearranged on several occasions. Thus at one time we find two judicial terms (rerum actus, cum res aguntur) in the year, a winter and a summer term, and two vacations, one in spring and another in autumn. Claudius substituted a single vacation at the close of the year, and made the law term continuous. Rerum actum, divisum antea in hibernos aestivosque menses, conjunxit, Suetonius, Claudius, 23. Galba abolished this vacation, and confined the intervals of litigation to dies feriati. Marcus Aurelius, in the time of Gaius, abolished the distinction between the jurisdiction term (dies fasti) and the trial term (rerum actus). He devoted two hundred and thirty days (adding the number of dies fasti to the number of dies comitiales) to forensic proceedings, under the name of dies juridici or dies judiciarii, and allowed even the rest of the year, dies feriati, to be used for litigation with the consent of the parties. Judiciariae rei singularem diligentiam adhibuit: fastis dies judiciarios addidit, ita ut ducentos triginta dies annuos rebus agendis litibusque disceptandis constitueret, Capitolinus, Marcus, 10. 'He also very carefully regulated the administration of justice, adding forensic days to the calendar, and allotting two hundred and thirty to litigation and civil suits.'

Subsequently to the time of Gaius, a law of Valentinian, Theodosius, and Arcadius, A. D. 389, while it declared the principle that all days are dies juridici, excepted, besides Sundays and certain other holidays, two months for harvest and vintage, and two weeks at Easter. Justinian further appointed, by way of interpolation in this law, certain vacations at Christmas, Epiphany, and Pentecost, Cod. 3, 12, 6, thus furnishing the model on which the four English law terms were regulated by Edward the Confessor. Subsequently the Statute of Westminster, 13 Edward I, permitted assizes to be held in the vacations, and thus a distinction grew up in England somewhat resembling that of the jurisdictional (dies fasti) and judicial terms (rerum actus); with this difference, however, that the same judges presided both in their own court held at Westminster, and on assize, where they acted under commissions to try cases in the county in which the cause of action arose. Thus in England a judge, after sitting at Westminster during term, was able to go on circuit during part of the vacation; but at Rome the distinction rested on the difference between proceedings in jure and in judicio. See Puchta, Institutionen, § 158.

§ 280. After the time of Gaius the liability of a defendant to interest and profits (fructus) from the date on which he was guilty of MORA appears to have been extended to all legacies without ex-

ception. Ex mora praestandorum fideicommissorum vel legatorum fructus et usurae peti possunt: mora autem fieri videtur cum postulanti non datur, Paulus 3, 8, 4. 'Delay of the heir to satisfy trusts and legacies entitles the cestui que trust and legatee to fruits and interest. Delay dates from the ineffectual demand of the creditor.'

A demand, however, is not requisite when a term for payment was fixed in the disposition which gave rise to the debt (dies adjecta): in other words, no interpellation is necessary in an obligation ex die, i. e. an obligatio with a dies adjecta; for then Mora begins at the expiration of the term. This is expressed by modern jurists in the maxim, dies interpellat pro homine, 'the day demands instead of the creditor.'

A further condition of Mora is the absence of all doubt and dispute, at least of all dispute that is not frivolous and vexatious, as to the existence and amount of the debt. Qui sine dolo malo ad judicem provocat non videtur moram facere, Dig. 50, 17, 63. 'An honest appeal to a judge is not deemed a mode of Delay.'

The date of Mora must not be identified with that of the Nativity of an action (actio nata), an important date, as we shall see, in the doctrine of Limitation or Prescription of which it is the starting-point, a starting-point that may be antecedent to Mora. Mora generally cannot precede an interpellation or demand of payment: but the omission of a demand is precisely a part of that course of remissness and negligence whereby, under the rules of Prescription, a creditor ultimately forfeits his right to sue. Savigny, § 239.

Mora on the part of a person under an obligation to another obliges him to put the latter in as good a position as he would have been in if there had been no Mora. Hence the effect of Mora debitoris may be to make the debitor liable for fructus or interest. So again, if after Mora some accidental circumstance makes delivery of a thing impossible, the party bound to deliver it is not discharged from his liability, since if it had not been for Mora on his part, the plaintiff might have escaped loss by previous alienation of the thing, or in some other way. On the same principle, if a thing which a person is bound to deliver to another falls in value after Mora, he must pay the latter the highest value which could have been obtained for the thing at any time, since his default was established. Windscheid, 1 § 280.

Litis contestatio, joinder of issue between the parties to an action, another landmark of great importance in Roman jurisprudence in ascertaining and measuring the sanctioning rights and obligations of suitors, 3 § 180, comm., may be regarded as a kind of bilateral Disposition to be classed among Quasi-contracts. The consequences,

however, of litis contestatio, in spite of difference of character, are to some extent similar to those of Mora. For in the event of condemning the defendant the judex has to regard the relations of the parties, as if restitution had been made at the time of litis contestatio. Hence a bona fide possessor is liable from this date for all fructus, although he was not previously liable for such as he had consumed. 4 § 114, comm.

§ 283. Money paid by mistake was not recoverable when the payer was liable to be sued for double damages, as in the actio legati per damnationem, Inst. 3, 27, 7, because then the payment is not deemed to be a mistake, but a compromise, in order to avoid the chance of condemnation in double damages. The laws protecting certain rights by duplication of damages, 4 § 171, would have been evaded if a debtor was allowed to pay the simple damages and then attempt to recover them back by condictio indebiti soluti.

§ 285. So by English law aliens were not, till recently, allowed to purchase real property or to take it by devise. Such property, purchased by an alien or devised to an alien, was forfeited to the crown. An alien, however, could hold personal property and take bequests of personal property. In France, formerly, an alien was not allowed to make a will, but all his property at his death escheated to the crown by the droit d'aubaîne. [Aubain is from alibanus. Alibi in barbarous Latin produced alibanus, just as longiter produced lontanus and ante antianus. Diez.]

§ 289. Justinian, following the tendency of previous legislation, abolished the distinction between legacies and trusts, enacting that legacies should no longer be governed by the rigours of the civil law, but subject to the same rules and construed with the same liberality as trusts, Inst. 2, 20, 2 and 3 Nostra autem constitutio (Cod. 6, 43, 1), quam cum magna fecimus lucubratione, defunctorum voluntates validiores esse cupientes et non verbis, sed voluntatibus eorum faventes, disposuit, ut omnibus legatis una sit natura et, quibuscunque verbis aliquid derelictum sit, liceat legatariis id persequi non solum per actiones personales, sed etiam per in rem et per hypothecariam . . . Sed non usque ad eam constitutionem standum esse existimavimus, cum enim antiquitatem invenimus legata quidem stricte concludentem, fideicommissis autem, quae ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem: necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia.

By English law, a will of realty operates as a mode of conveyance and document of title without probate, but since the Land Transfer Act, 1897, it is usually proved. A will of personalty requires for its authentication to be proved before a court by the oath of the

executor and, unless the attestation clause is in a certain form, by the affidavit of one of the subscribing witnesses; or, if the validity of the will is disputed, by examination of the witnesses on oath in the presence of the parties interested. The will itself is deposited in the registry of the Court of Probate; a copy of it in parchment, under the seal of the Court of Probate, delivered to the executor along with a certificate of proof, is the only proper evidence of his right to intermeddle with the personal estate of the testator.

The following were the corresponding formalities of Roman law prescribed by lex Julia vicesimaria: Paulus, Sent. Rec. 4, 6:—

'A will is opened in the following manner: the witnesses, or the majority, who affixed their seals, are summoned and acknowledge their seals, the cord is broken, the tablets are opened, the will is read, a copy is taken, a public seal is affixed to the original, and it is deposited in the archives, so that if the copy is ever lost there may be a means of making another.

'In municipalities, colonies, towns, prefectures, wicks, castles, market towns, a will must be read in the forum or basilica, in the presence of the attesting witnesses or of respectable persons, between eight o'clock in the morning and four o'clock in the afternoon; and, as soon as a copy has been made, must be sealed up again by the magistrate in whose presence it was opened.

'A will is intended by the law to be opened immediately after the death of the testator; accordingly, though rescripts have varied, it is now the rule that, if all the parties are present, three or five days is the interval within which the tablets must be opened; if they are absent, the same number of days after they are assembled; in order that heirs, legatees, manumitted slaves, and the military treasury (entitled, 3 § 125, to vicesima hereditatum, i. e. 5 per cent. on the value of Roman citizens' testamentary successions), may come into their rights without unnecessary delay.'

In cases of urgency, when the will was opened in the absence of the attesting witnesses in the presence of respectable persons, it was afterwards forwarded to the witnesses for the verification of their seals, Dig. 29, 3, 7. Every one who desired it had the power of inspecting a will and taking a copy, Dig. 29, 3, 8.

COMMENTARIVS TERTIVS

INTESTATORVM HEREDITATES

§ 1. *Intestatorum hereditates* ⟨*ex*⟩ *lege* XII *tabularum primum ad suos heredes pertinent.*

Inst. 3, 1, l. 1; Collat. 16, 2, 1.

§ 1. Intestate inheritances by the law of the Twelve Tables devolve first on self-successors (sui heredes).

§ 2. *Sui autem heredes existimantur liberi qui in potestate morientis fuerunt, ueluti filius filiaue, nepos neptisue* ⟨*ex filio*⟩, *pronepos proneptisue ex nepote filio nato prognatus prognataue. nec interest* ⟨*utrum*⟩ *naturales* ⟨*sint*⟩ *liberi an adoptiui. ita demum tamen nepos neptisue et pronepos proneptisue suorum heredum numero sunt, si praecedens persona desierit* ⟨*in potestate parentis esse, siue morte id acciderit,*⟩ *siue alia ratione, ueluti emancipatione. nam si per id tempus quo quisque moritur filius in potestate eius sit, nepos ex eo suus heres esse non potest. idem et in ceteris deinceps liberorum personis dictum intellegemus.*

Inst. 3, 1, l. 2; Collat. 16, 2, 2.

§ 2. Self-successors are children in the power of the deceased at the time of his death, such as a son or a daughter, a grandchild by a son, a great-grandchild by a grandson by a son, whether such children are natural or adoptive: subject, however, to this reservation, that a grandchild or great-grandchild is only self-successor when the person in the preceding degree has ceased to be in the power of the parent either by death or some other means, such as emancipation; for instance, if a son was in the power of the deceased at the time of his death, a grandson by that son cannot be a self-successor, and the same proviso applies to the subsequent degrees.

§ 3. *Vxor quoque quae in manu uiri est ei sua heres est, quia filiae loco est. item nurus quae in filii manu est, nam et haec neptis loco est. sed ita demum erit sua heres,* ⟨*si*⟩ *filius, cuius in manu fuerit, cum pater moritur, in*

§ 3. A wife in the hand of her husband is a self-successor to him, for she is in the position of a quasi daughter; also a son's wife in the hand of the son, for she is a granddaughter: subject, however, to the proviso that she is not self-successor if her husband is

potestate eius non sit. idemque dicemus et de ea quae in nepotis manu matrimonii causa sit, quia proneptis loco est.

Collat. 16, 2, 3.

in the power of his father at the time of his father's death. A wife in the hand of a grandson is a self-successor, subject to the same proviso, because she is in the position of a great-granddaughter.

§ 4. *Postumi quoque, ⟨qui⟩ si uiuo parente nati essent, in potestate eius futuri forent, sui heredes sunt.*

Inst. l. c.; Collat. 16, 2, 4.

§ 4. Afterborn children, who, if born in the lifetime of the parent, would have been subject to his power, are self-successors.

§ 5. *Idem iuris est de his, quorum nomine ex lege Aelia Sentia uel ex senatusconsulto post* mortem patris causa probatur. nam et hi uiuo patre causa probata in potestate eius futuri essent.

Collat. 16, 2, 5; cf. Collat. 3, 7.

§ 5. Also those in whose behalf the provisions of the lex Aelia Sentia or the senatusconsult have been satisfied by proof of excusable error subsequently to the death of the parent, for if the error had been proved in the lifetime of the parent they would have been subject to his power.

§ 6. Quod etiam de eo filio, qui ex prima secunda*ue* mancipation*e* post mortem patris manumittitur, intellegemus.

§ 6. Also, a son, who has undergone a first or second mancipation and is manumitted after the death of the father, is a self-successor.

§ 7. Igitur cum filius filiaue et ex altero filio nepotes neptesue extant, pariter ad hereditatem uocant*ur*; nec qui gradu proximior est, ulteriorem excludit. aequum enim uidebatur nepotes neptesue in patris sui locum portionemque succedere. pari ratione et si nepos neptis*ue* sit ex filio et ex nepote pronepos *pro*neptisue, simul omnes uocantur ad hereditatem.

Inst. 3, 1, 6.

§ 7. Accordingly, a son or daughter and grandchildren by another son are equally called to the inheritance; nor does the nearer grade exclude the more remote, for justice seemed to dictate that grandchildren should succeed to their father's place and portion. Similarly, a grandchild by a son and a great-grandchild by a grandson by a son are called contemporaneously to the inheritance.

§ 8. Et quia placebat nepotes neptesue, item pronepotes proneptesue in parentis sui locum succedere, conueniens esse uisum est non in capita, sed ⟨*in*⟩ stirpes hereditate*m* diuidi; ita ut filius partem dimidiam hereditatis ferat et ex altero filio duo pluresue nepotes alteram dimidiam; item si ex duobus

§ 8. And as it was deemed to be just that grandchildren and great-grandchildren should succeed to their father's place, it seemed consistent that the number of stems (stirpes), and not the number of individuals (capita), should be the divisor of the inheritance; so that a son should take a moiety, and grand-

filiis nepotes extent, ex altero filio unus forte uel duo, ex altero tres aut quattuor, ad unum aut ad duos dimidia pars pertineat et ad tres aut quattuor altera dimidia. Inst. l. c.

children by another son the other moiety; or if two sons left children, that a single grandchild or two grandchildren by one son should take one moiety, and three or four grandchildren by the other son the other moiety.

§ 1. The words 'testate' and 'intestate,' in the language of English lawyers, are only applicable, I believe, to a deceased person. The awkwardness of having no corresponding adjectives to couple with succession or inheritance must be my apology for sometimes speaking of testate or intestate succession or inheritance.

§ 2. For the meaning of suus heres see commentary on 2 §§ 157, 123.

§ 5. Cf. 1 §§ 29, 32; 2 § 142.

§ 6. Cf. 1 § 132; 2 § 141.

DE LEGITIMA AGNATORVM SVCCESSIONE.

§ 9. Si nullus sit suorum heredum, tunc hereditas pertinet ex eadem lege XII tabularum ad *a*gnatos.

Inst. 3, 2, pr.; Gaius in Collat. 6, 2, 9.

§ 9. If there is no self-successor, the inheritance devolves by the same law of the Twelve Tables on the agnates.

§ 10. *V*ocantur autem agnati, qui legitima cognatione iuncti sunt. legitima autem cognatio est ea, quae p*er* u*i*rilis sexus personas *coniungitur. itaque eodem p*atre nati fratres agna*ti sibi sunt, qui etiam consanguinei* uocantur, nec requiritur an etiam matrem eandem habuerint. item patruus fratris filio et inuicem is illi agnatus est. eodem numero sunt fratres patrueles inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique et*iam* consobrinos uocant. qua ratione scilicet etiam ad plures gradus agnationis peruenire poterimus.

Inst. 3, 2, 1; Gaius in Collat. 6, 2, 10.

§ 10. Those are called agnates who are related by civil law. Civil relationship is kinship through males. Thus brothers by the same father are agnates, whether by different mothers or not, and are called consanguineous; and a father's consanguineous brother is agnate to the nephew, and vice versa; and the sons of consanguineous brothers, who are generally called consobrini, are mutual agnates; so that there are various degrees of agnation.

§ 11. Non tamen omnibus simul agnat*i*s dat lex XII tabularum hereditatem, sed his qu*i*

§ 11. Agnates are not all called simultaneously to the inheritance by the law of the

tum, cum certum est aliquem intestatum decessisse, proximo gradu sunt. Inst. 3, 2, 2; Gaius in Collat. 16, 2, 11.

Twelve Tables, but only those of the nearest degree at the moment when it is certain that the deceased is intestate.

§ 12. Nec in eo iure successio est. ideoque si agnatus proximus hereditatem omiserit uel antequam adierit decesserit, sequentibus nihil iuris ex lege conpetit.

Gaius in Collat. 16, 2, 12.

§ 12. And in title by agnation there is no succession; that is to say, if an agnate of the nearest grade abstains from taking the inheritance, or die before he has entered on it, the agnates of the next grade do not become entitled under the statute.

§ 13. Ideo autem non mortis tempore quis *proxi*mus *fue*rit requirimus, sed eo tempore, quo certum fuerit aliquem intestatum decessisse, quia si quis *testamento fa*cto decesserit, melius esse uisum est tunc requiri proximum, cum certum esse coeperit neminem ex eo testamento fore heredem. Inst. l. c.; Gaius in Collat. 16, 2, 13.

§ 13. The date for determining the nearest agnate is not the moment of death, but the moment when intestacy is certain, because it seemed better, when a will is left, to take the nearest agnate at the moment when it is ascertained that there will be no testamentary heir.

§ 14. Quod ad feminas tamen attinet, in hoc iure aliud in ipsarum hereditatibus capiendis placuit, aliud in ceterorum [bonis] ab his capiendis. nam feminarum *heredita*tes proinde ad nos agnationis iure redeunt atque masculorum; nostrae uero hereditates ad feminas ultra consanguineorum gradum non pertinent. itaque soror fratri sororiue legitima heres est, amita uero et fratris filia legitima heres esse ⟨*non potest. sororis autem nobis loco est*⟩ etiam mater aut nouerca, quae per in manum conuentionem apud patrem nostrum iura filiae nacta est. Inst. 3, 2, 3; Gaius in Collat. 16, 2, 14.

§ 14. As to females, the rules of civil law are not the same in respect of the inheritances which they leave and in respect of the inheritances which they take. An inheritance left by a female is acquired by the same title of agnation as an inheritance left by a male, but an inheritance left by a male does not devolve on females beyond sisters born of the same father. Thus a sister is by civil law the heir of a sister or brother by the same father, but the sister of a father and daughter of a brother have no civil title to the inheritance. The same rights as those of a sister belong to a mother or stepmother who passes into the hand of a father by marriage and acquires the position of a daughter.

§ 15. Si ei qui defunctus erit, *sit* frater et alterius fratris filius, sicut ex superioribus

§ 15. If the deceased leaves a brother and another brother's son, as observed before (§ 11),

intellegitur, frater potior est, quia gradu praecedit. sed alia facta est iuris interpretatio inter suos heredes. Inst. 3, 2, 5; Gaius in Collat. 16, 2, 15.

the brother has priority, because he is nearer in degree, which differs from the rule applied to self-successors.

§ 16. Quodsi defuncti nullus frater extet, ⟨*sed*⟩ sint liberi fratrum, ad omnes quidem hereditas pertinet; sed quaesitum est, si dispari forte numero sint nati, ut ex uno unus uel duo, ex altero tres uel quattuor, utrum in stirpes diuidenda sit hereditas, sicut inter suos heredes iuris est, an potius in capita. iam dudum tamen placuit in capita diuidendam esse hereditatem. itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas diuidetur, ita ut singuli singulas portiones ferant.

Gaius in Collat. 16, 2, 16.

§ 16. If the deceased leaves no brother, but children of more than one brother, they are all entitled to the inheritance; and it was once a question, in case the brothers left an unequal number of children, as if one of them leaves only one child and another three or four, whether the number of stems (stirpes) was to be the divisor of the inheritance, as among self-successors, or the number of individuals (capita); however, it has long been settled that the divisor is the number of individuals. Accordingly, the total number of persons determines the number of parts into which the inheritance must be divided, and each individual takes an equal portion.

§ 17. Si nullus agnatus sit, eadem le*x* XII tabularum gen*ti*les ad hereditatem uoc*at*. qui sint autem gentiles, primo commentario rettulimus; et cum illic admonuerimus totum gentilic*i*um ius in desuetudinem abiisse, superuacuum est hoc quoque loco de eadem *re* curiosius tractare.

§ 17. In the absence of agnates the same law of the Twelve Tables calls the gentiles to the inheritance. Who are gentiles was explained in the first book (1 § 164 *a*), and as we then stated that the whole law relating to gentiles is obsolete, it is unnecessary to go into its details on the present occasion.

§ 9. The term agnatio has already occurred (2 § 131) in the exposition of testacy, where it denoted the birth of a suus heres, and here in the doctrine of intestacy it has an allied signification. The same persons who in relation to a common ancestor are sui heredes, in relation to one another are agnati. Agnates, accordingly, may be described as all the members of a civil family, cf. 1 § 156; but then we must add that the civil family may either be actual or ideal, meaning by ideal either a civil family once actual but disintegrated by the death of the paterfamilias, or a civil family, which was never actually subject to a common paterfamilias, but which would be so if we imagine a deceased common ancestor to be alive. While the common ancestor survives, the bonds of agnation are close,

and the family is actual; after his death, when his descendants have formed separate families, all the members of those families are still agnates, because they are members of an ideal family which once was actual; and the descendants of those descendants are more remotely agnates, because, though never members of an actual family, they would have been so if the common ancestor had lived for, say, a hundred years. Similarly the wider group of gentiles, § 17, consists of persons who, it may be supposed, would be under the power of some long-forgotten common ancestor, if he were alive.

The words of the Twelve Tables creating title by agnation are as follow: Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. 'If a man die intestate, leaving no self-successor, his nearest agnate shall have the family property.'

§ 10. Consanguinei, brothers or sisters of the same father, opposed to uterini, brothers or sisters by the same mother, are properly included among agnates, if they have not undergone any capitis deminutio, being agnates of the first degree; but as females were only entitled to inherit by the first degree of agnation, § 14, the word 'agnates' was sometimes limited to denote male agnates. Agnati autem sunt cognati virilis sexus per virilem descendentes, Paulus, Sent. Rec. 4, 8, 13. 'Agnates are male cognates related through males.' It is to be remembered that the tie of agnation embraced persons who were adopted into a family, as well as such natural relations or cognates as came within its principle.

§ 12. If the nearest degree of agnates in existence omitted to take the inheritance, or died before acceptance, the inheritance did not devolve on the next degree of agnates; thus the jus civile did not admit a successio graduum, as for instance if a man died intestate leaving a brother and a nephew, the son of a deceased brother, and the surviving brother did not enter on the inheritance, the right to do so did not pass from him to the nephew, who was next in succession but remained vacant, no repudiation of hereditas delata being it would seem possible in early law. This rule was a scrupulous interpretation of the exact words of the Twelve Tables: Si intestato moritur cui suus heres nec escit, adgnatus *proximus* familiam habeto. As the law of inheritance based on the Twelve Tables found no place for a successio graduum, so neither did it admit a successio ordinum. Thus if the proximus agnatus, or proximi agnati, abstained from taking the inheritance, the order of gentiles, which was next by civil law to that of the agnates, could make no claim to it. 'In legitimis hereditatibus successio non est.' The abeyance of the inheritance arising from these circumstances was cut short by usucapio pro herede, 2 § 52, &c. But a more suitable way of obviating this inconvenience of the ancient law was found in

the bonorum possessio of the praetor, whereby in default of any one claiming by a valid civil title, the nearest blood relation, or cognate, was put in the position of heir. Under these praetorian rules of inheritance, at least when they were not simply confirmatory of the civil law, cf. § 28, both successio graduum and successio ordinum were possible. Justinian, however, abolished the rule of the civil law itself, and allowed a devolution through the degrees of agnation, on the ground that, as the burden of tutela devolved through the degrees of agnation, there ought to be a corresponding and compensating devolution of the advantages of inheritance, Inst. 3, 2, 7. This change, however, was deprived of importance by the subsequent Novella, 118, which consolidated and amended the law of inheritance, discarding the agnatic principle of the old law, and substituting for it that by cognatio.

§ 13. The moment at which it is ascertained that the deceased is intestate will be separated by an interval from the moment of his decease, especially when the intestacy is caused by an heir instituted in a will not accepting within the time of cretio or by his subsequent repudiation or incapacity, or by the failure of the condition on which he was instituted. In this interval the nearest agnate may die, and a remoter agnate become the nearest agnate. It therefore was necessary to determine whether the title of nearest agnate is acquired at the moment of decease or of ascertained intestacy; and the latter moment was selected. If the death of the testator had been selected, then, if the nearest agnate died in the interval, there would be no heir; neither the heir of the deceased, as the right to enter was strictly personal, nor the then next agnate, as proxumus, the word used in the Twelve Tables, excludes successio graduum: nor the gentiles, as the words (si adgnatus nec escit) exclude successio ordinum.

§ 14. The limitation, in respect of females, of title by agnation to females who were agnates in the first degree (consanguineae) was not contained in the Twelve Tables, but introduced by the restrictive interpretation of jurists following the analogy of the lex Voconia (B.C. 169), which imposed disabilities on women, Paulus, Sent. Rec. 4, 8, 22. Cf. Inst. 3, 2, 3 Media autem jurisprudentia, quae erat lege quidem duodecim tabularum junior, imperiali autem dispositione anterior, subtilitate quadam excogitata, praefatam differentiam inducebat. The harshness of this limitation was mitigated by the praetors, who introduced title by cognation, and allowed females of remoter degrees of agnation to succeed in the order of cognates in default of heirs by title of agnation; but Justinian totally abolished the limitation, and restored the rule of the Twelve Tables, allowing females to succeed in the order of agnates, however remote might be their degree of agnation, provided that no nearer degree was in existence.

The celebrated Novella, 118, as above stated, totally abolished title by agnation, and made succession by intestacy among collaterals dependent on the degrees of cognation or nearness of natural relationship. In this system of inheritance, from which our own law for the distribution of personalty is derived, no difference is made between males and females.

§ 18. Hactenus lege XII tabularum finitae sunt intestatorum hereditates. quod ius quemadmodum strictum fuerit, palam est intellegere.

§ 19. Statim enim emancipati liberi nullum ius in hereditatem parentis ex ea lege habent, cum desierint sui heredes esse.

§ 20. *I*dem iuris est, si ideo liberi non sint in potestate patris, quia sint cum eo ciuitate *R*omana donati nec ab imperatore in potestate*m* redacti fuerint.

§ 21. Item agnati capite deminuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione perimitur.

§ 22. Item proximo agnato non adeunte hereditatem nihilo magis sequens iure legitimo admittitur.

§ 23. Item feminae agnatae, quaecumque consanguineorum gradum excedunt, nihil iuris ex lege haben*t*.

§ 24. Similiter non admittuntur cognati, qui per feminini sexus personas necessitudine iunguntur; adeo quidem, ut nec inter matrem et filium filiamue

§ 18. These are all the provisions in the law of the Twelve Tables for intestate devolution, and how strictly they operated is patent.

§ 19. For instance, children immediately they are emancipated have no right to the inheritance of their parent under that law, since they are thereby divested of the character of self-successors.

§ 20. In the same position also are children whose freedom from the power of their parent was only caused by the fact that on their receiving jointly with their father a grant of Roman citizenship (1 § 94), there was no express order of the emperor subjecting them to parental power.

§ 21. Again, agnates who have undergone a capitis deminutio are not admitted to the inheritance under this law, title by agnation being extinguished by capitis deminutio.

§ 22. And if the nearest agnate does not enter on an inheritance, the next degree, according to the law of the Twelve Tables, is not in any way entitled to succeed.

§ 23. Female agnates beyond the degree of sisters by the same father have no title to succeed under this statute.

§ 24. Cognates who trace their kin through females are similarly barred, so that even a mother and a son or daughter have no reciprocal right of succession, un-

ultro citroque hereditatis capiendae ius conpetat, praeterquam si per in manum conuentionem consanguinitatis iura inter eos constiterint.

less by subjection to the hand of the husband the mother has become a quasi sister to her children.

§ 25. Sed hae iuris iniquitates edicto praetoris emendatae sunt.

§ 25. But to these legal inequalities the edict of the praetor administers a corrective.

§ 26. Nam *liberos* omnes, qui legitimo iure deficiuntur, uocat ad hereditatem, proinde ac si in potestate parentis mortis tempore fuissent, siue soli sint siue etia*m* sui heredes, id est qui in potestate patris fuerunt, concurrant. Inst. 3, 1, 9.

§ 26. For all children whose statutory title fails are called by the praetor to the inheritance, just as if they had been in the power of their parent at the time of his decease, whether they come in alone or in concurrence with self-successors, that is, with other children who were actually subject to the power of the parent.

§ 27. Agnatos autem capite deminutos non secundo gradu post suos heredes uocat, id est non eo gradu uocat, quo per legem uocarentur, si capite *de*minuti non essent, sed tertio proximitatis nomine; licet enim capitis deminutione ius legitimum perdiderint, certe cognationis iura retinent. itaque si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiamsi longiore gradu fuerit. Inst. 3, 5, 1.

§ 27. Agnates who have undergone a capitis deminutio minima are called by the praetor, not indeed in the next degree to self-successors, that is, in the order in which the law of the Twelve Tables would have called them but for their capitis deminutio, but in the third rank under the designation of cognates (next of kin); for though their capitis deminutio has blotted out their statutory title, they nevertheless are still entitled as cognates; though if another person exists with unimpaired title by agnation, he is called in preference, although he may be in a remoter degree.

§ 28. Idem iuris est, ut quidam putant, in eius agnati persona, qui proximo agnato omittente hereditatem nihilo magis iure legitimo admittitur. sed sunt qui putant hunc eodem gradu a praetore uocari, quo etiam per legem agnatis hereditas datur.

§ 28. The rule is similar, according to some, in respect of the remoter agnate who has no statutory title to succeed on the nearest agnate failing to take; according to others, the praetor calls him to the succession in the order allotted by the statute to agnates.

§ 29. Feminae certe agnatae, quae consanguineorum gradum excedunt, tertio gradu uocantur, id est si neque suus heres neque agnatus *u*llus erit. Inst. 3, 5, 2.

§ 29. Female agnates, at all events, beyond the degree of sisters are called in the third degree, that is to say, after self-successors and other agnates.

§ 30. Eodem gradu uocantur etiam eae personae, quae per feminini sexus personas copulatae sunt. Inst. l. c.

§ 30. So are those persons who trace their kindred through females.

§ 31. Liberi quoque qui in adoptiua familia *sunt* ad naturalium parentum hereditatem hoc eodem gradu uoca*n*tur. Inst. 3, 5, 3.

§ 31. Children in an adoptive family are called to succeed their natural parents in the same order.

§ 32. Quos autem *p*raetor uocat ad hereditatem, hi heredes ipso quidem iure non | fiunt; nam praetor heredes facere non pot*est*; *per legem* | *enim tantum uel similem iuris constitutionem* h*eredes fi*|unt, ueluti per senatusconsultum et constitutionem principalem. sed *cum eis* pr*ae*tor ⟨*dat bonorum possessionem*⟩, loco heredum co*n*stituunt*ur*.

§ 32. Those whom the praetor calls to an inheritance do not become heirs (heredes) at civil law, for the praetor cannot make an heres; only a statute or similar ordinance, such as a decree of the senate or an imperial constitution, being able to do so; thus the praetor's grant of possession only puts the grantee in the position of an heir.

§ 33. | A*dhuc autem etia*m alios conplures gradus p*raetor facit in* | *bonorum possessionibus dandis, dum id agit, ne quis sine successore* | *moriatur.* de quibus in his commentariis consul*to* | *non agimus, cum* hoc ius totum propriis co*m*mentariis *ex*|*ecuti simus.*

§ 33. Several additional grades of bonorum possessio are recognized by the praetor on account of his desire that no one may die without a successor; but I forbear to examine them on the present occasion, because I have handled the whole subject of title by descent in a separate treatise devoted to this matter.

§ 33 *a*. *Hoc* solum admonuisse sufficit ——|——| tab*u*lis —— hereditatem ——| —— inu*idi*osum —— *per*| in man*um* conu*en*tionem iura consanguin*itatis* na|cta ——| ——|——| fratre ——| —(5 *uersus in C legi nequeunt*) ——|——. (8 *uersus in C legi nequeunt*) ——|—— nam —|——|—— —|—— *heredi*tas non pertine-| —— (8 *uersus in C legi nequeunt*) ——|

§ 33 *a*. [? Sc. Tertullianum; cf. Inst. 3, 3; Ulp. 26, 8.]

§ 33 *b*. *Aliquando tamen neque emendandi neque inpugnandi ueteris iuris sed* | magi*s*

§ 33 *b*. Sometimes, however, the object of the praetor in granting bonorum possessio is rather to

confirmandi gratia pollicetur bonorum possessionem. nam illis quoque, | qui rec*te facto testamento heredes instituti sunt,* | dat sec*undum tabulas bonorum possessionem.*

confirm the old law than to amend or contradict it, for he likewise gives juxta-tabular possession to those who have been instituted heredes in a legally valid will.

§ 34. *item ab int*estat*o* heredes suos et agn*ato*s ad bonorum possessionem uocat. quibus casibus beneficium eius in eo solo uidetur aliquam utilitatem habere, ut is, qui ita bonorum possessionem petit, interdicto cuius principium est QVORVM BONORVM uti possit. cuius interdicti quae sit utilitas, suo loco proponemus. alioquin remota quoque bonorum possessione ad eos hereditas pertinet iure ciuili.

§ 34. So also, when a man dies intestate, the praetor grants bonorum possessio to self-successors and agnates, the only advantage they derive from the grant being that it entitles them to the interdict beginning with the words: 'Whatsoever portion of the goods' (the use of which will be explained in due time and place, 4 § 144), for independently of the grant of possession, they are entitled to the inheritance by the civil law.

§ 35. Ceterum saepe quibusdam ita datur bonorum possessio, ut is cui data sit ⟨*non*⟩ optineat hereditatem; quae bonorum possessio dicitur sine re.

§ 35. Possession is often granted to a person who will not in fact obtain the inheritance, in this case the grant is said to be one which has no effect (sine re).

§ 36. Nam si uerbi gratia iure facto testamento heres inst*it*utus creuerit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo quod iure ciuil*i* heres sit, nihilo minus ii, qui nullo facto testamento ad intestati bona uocantur, possunt petere bonorum possessionem; sed sine re ad eos [hereditas] pertinet, cum testamento scriptus heres euincere hereditatem possit.

§ 36. For instance, if an heir instituted by a duly executed will formally accepts the inheritance, but declines to demand possession according to the will, contenting himself with his title at civil law, those who without a will would be entitled by intestacy may nevertheless obtain a grant of possession from the praetor, but the grant will be one having no effect (sine re), because the testamentary heir can enforce his civil title to the inheritance against them.

§ 37. Idem iuris est, si intestato aliquo mortuo suus heres no|lu*erit* petere *bonorum* possessionem, contentus l*egitimo iure* ——| et agnato conpetit quidem bonorum possessio, sed sine re, quia euinci hereditas *a* suo herede potest. et [illud] conuenient*er*, si ad agnatum

§ 37. The same happens when a man dies intestate and a self-successor declines to demand possession, contenting himself with his civil title; for an agnate may obtain a grant of possession, but it will have no effect, because the civil inheritance can be claimed by the self-successor. Similarly,

iure ciuili pertinet hereditas et is adierit hereditatem, sed bonorum possessionem petere noluerit, et [si quis ex proximis] cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem.

if an agnate entitled by civil law accepts the civil inheritance but omits to demand possession, a cognate can obtain a grant of possession, but it has no effect, for the same reason.

§ 38. Sunt et alii quidam similes casus, quorum aliquos superiore commentario tradidimus.

§ 38. There are other similar cases, some of which were mentioned in the preceding book.

§ 25. To the divergence of the civil (agnatio) and natural (cognatio) families, to the desire, that is, to correct the non-natural devolution of successions, Sir Henry Maine attributes the introduction in Roman jurisprudence of Testamentary dispositions (Ancient Law, ch. vi).

§ 32. The praetor, by virtue of his executive power (imperium):

(1) Gave bonorum possessio to a person who had a legal title to the inheritance, that is, he enforced the rights conferred on persons by the civil law (juris civilis confirmandi causa); e. g. he gave bonorum possessio secundum tabulas to the heir instituted in a will valid by civil law, § 36, or bonorum possessio contra tabulas to certain praetermitted self-successors, 2 § 125, or bonorum possessio ab intestato to the suus heres or the agnate, § 37; cf. § 34.

(2) He also gave bonorum possessio to persons on whom the civil law had conferred no rights, that is, he supplemented the law (juris civilis adjuvandi causa); e. g. in default of sui heredes and proximi agnati he granted bonorum possessio ab intestato to cognates; he gave juxta-tabular possession to the heir under a will invalid at civil law, because the testator had been incapacitated at some period between the execution of his will and his decease: such grant of possession being ineffective (sine re) against any person entitled ab intestato by the civil law, 2 §§ 147, 149, and Ulpian, 23, 6. So again he gave bonorum possessio secundum tabulas to the heir under a will invalid at civil law, from want of mancipation or nuncupation, 2 § 149, and such will was ineffective (sine re) against an agnate claiming as heir by intestacy, until a rescript of the Emperor Antoninus (probably Marcus Aurelius) made such bonorum possessio effective (cum re) by giving the grantee a good defence against the civil heir, 2 §§ 119, 120.

(3) He sometimes, though rarely and by something like a stretch of his authority, gave possession adverse to rights which the law had conferred on other persons, that is, he contradicted or corrected the law. The principal cases in which he did this were those in which he protected the interests of emancipated children. Thus by

bonorum possessio contra tabulas and by bonorum possessio intestati he put emancipati in the same position as sui, giving them effective possession (cum re) against the claim of the civil heir. He also gave juxta-tabular possession to the afterborn stranger (postumus alienus), Inst. 3, 9 pr. who, as an uncertain person, could not be instituted by the civil law, 2 § 242. The difficulty which the praetor found in making his title to the inheritance superior to that of Jus Civile is shown by the fact that it required a special act of legislation to make the praetorian will effective (cum re) against the agnatic heir ab intestato, and it is also illustrated by the controversy mentioned in § 28, where we see that it is doubtful whether he could make use of the principle of successio graduum, which he adopted in his edict, so as to put an agnate who had no title at law in the position of civil heir.

As in the two latter functions of supplementing and correcting the law, the praetor did what is elsewhere performed by courts of equity, we have sometimes translated the contrasted terms heres and bonorum possessor by the terms 'legal successor or heir' and 'equitable successor or heir.'

The claim of an heir (heres) founded on a title at civil law was called hereditatis petitio; a claim founded on a praetorian title, e.g. cognation, was pursued by the Interdict Quorum bonorum, or, in the latest period, by possessoria hereditatis petitio, Dig. 5, 5, 1. Such at least is Savigny's view, who makes no essential difference between the Interdict Quorum bonorum and Possessoria hereditatis petitio. According to Vangerow, § 509, and more recent writers, however, the Interdict was confined to the purpose of obtaining Possession of the corporeal things belonging to the inheritance, separate fictitious actions being employed on account of other rights and liabilities, for the equitable or praetorian successor could not sue or be sued by direct actions. Thus it was only at a comparatively late time that Possessoria hereditatis petitio was allowed as a general means of claiming the inheritance when a claimant (e. g. cognatus or emancipatus) had a praetorian title, corresponding to Hereditatis petitio, which was the means of claiming the civil inheritance. Accordingly the Interdict could not be brought, like Hereditatis petitio, against debtors to the inheritance; but only against possessors of corporeal hereditaments. Interdicto quorum bonorum debitores hereditarii non tenentur, sed tantum corporum possessores, Dig. 43, 2, 2. Cf. Sohm, p. 552.

Huschke supposes that after *sufficit* Gaius explained the provisions of the S. C. Tertullianum, passed in the time of Hadrian, on which he wrote a separate treatise.

§ 33 *a*. The orders or grades or classes to whom the praetor successively granted bonorum possessio in intestacy were as follow:

(1) Children (liberi), including not only sui heredes, but also emancipated children, § 26, on condition that the latter brought their goods into hotchpot (collatio bonorum), Dig. 37, 6. Children given in adoption were not admitted in this order, but in the third order of cognates, § 31.

(2) Statutory or civil heirs (legitimi), i. e. all who were entitled to inherit under the Twelve Tables or any statute; e. g. agnates who were entitled under the Twelve Tables; mothers, who, though belonging to a different civil family, were entitled to succeed their children under the Sc. Tertullianum, a statutory departure from the principles of the old civil law; children, who were entitled to succeed their mothers under the Sc. Orphitianum, a further departure from the agnatic principle, probably passed soon after the Institutes of Gaius were written, on which this jurist also wrote a special commentary; and sui heredes who had repudiated or omitted to demand possession as members of the first order within the interval allowed, namely, a year.

(3) Next of kin (proximi cognati) to the sixth degree, including those who had neglected to claim in the first or second order.

(4) Husband and wife inter se (vir et uxor), when the wife is not in manu. A wife in manu would be quasi daughter and therefore sua heres and entitled to succeed with liberi in the first order.

These various grades of title are called unde liberi, unde legitimi, unde cognati, unde vir et uxor, phrases which properly denote those articles of the edict in which these classes are summoned to the succession: ea pars edicti unde liberi vocantur, &c., but are used by Roman lawyers as epithets of intestate bonorum possessio.

The degrees of cognation in a direct line are the number of generations that separate a descendant from an ascendant: to compute the degrees of collateral cognation we must add the degrees of direct cognation. Thus a man is one degree from his father, and therefore two from his brother and three from his nephew. He is two degrees from his grandfather, and therefore three from his uncle and four from his first cousin or cousin german (consobrinus). He is three degrees from his great-grandfather, and therefore four from his great-uncle and five from his great-uncle's son (propior sobrino) and six from his second cousin (sobrinus), that is, his great-uncle's grandson, for second cousins are the children of first cousins. He is seven degrees from his second cousin's children, and this is the only case in which the seventh degree of cognation was recognized as giving a title to succeed in intestacy, the law only recognizing in other lines the sixth degree of cognation. In English law collateral relationship is a title to inheritance or succession without any limit.

§ 36. Originally the person entitled to the praetorian succession was required to address a formal demand to the magistrate: but under Justinian any signification of intention to accept the succession was sufficient without a demand. The interval allowed for this signification of intention (agnitio) to a parent or child of the defunct was a year, to other claimants a hundred days. If a person in a superior order or degree omitted to signify his acceptance in the interval allowed, the succession then devolved to the next degree or order. If the person who thus omitted to signify acceptance had only a praetorian title to the succession, his right was entirely forfeited by the omission; but if he had a prior title at civil law he could by hereditatis petitio evict the bonorum possessor, who accordingly would have only a nugatory or ineffective possession (sine re).

(As to bonorum possessio intestati cf. Sohm, p. 566.)

§ 39. Nunc de libertorum bonis uideamus. Inst. 3, 7 pr.

§ 40. Olim itaque licebat liberto patronum suum *in*pune testamento praeterire. nam ita demum lex XII tabularum ad hereditatem liberti uocabat patr*on*um, si intestat*us* mortuus esset libertus nullo suo herede *re*licto. itaque intestato quoque mortuo liberto, si is *su*um heredem reliquerat, nihil in bonis eius patrono iuris erat. et siquidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla uidebatur esse querella; si uero uel adoptiuus filius filiaue uel uxor quae in manu esset sua heres esse*t*, aperte iniquum erat nihil iur*is* patrono superesse. Inst. l. c.

§ 41. Qua de causa postea praetoris edicto haec iur*is* iniquitas em*en*data est. siue enim faciat testamentum libertus, iubetur ita testari, ut patrono suo partem dimidiam bonorum suorum relinqua*t*, et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono

§ 39. Succession to freedmen next demands our notice.

§ 40. Freedmen were originally allowed to pass over their patron in their testamentary dispositions. For by the law of the Twelve Tables the inheritance of a freedman only devolved on his patron when he died intestate and without leaving a self-successor. So if he died intestate leaving a self-successor, the patron was excluded, which, if the self-successor was a natural child, was no grievance; but if the self-successor was an adoptive child or a wife in hand (manu), it was clearly hard that they should bar all claim of the patron.

§ 41. Accordingly, at a later period, the praetor's edict corrected this injustice of the law. For if a freedman makes a will, he is commanded to leave a moiety of his fortune to his patron; and if he leaves him nothing, or less than a moiety, the patron can obtain contra-tabular possession

contra tabulas testamenti partis dimidiae bonorum possessio; si uero intestatus moriatur suo herede relicto adoptiuo filio ⟨uel⟩ uxore quae in manu ipsius esset, uel nur*u* quae in manu filii eius fuerit, da*tur* aeque patrono aduersus hos suos heredes partis dimidiae bonorum possessio. prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti *sint*, *aut praeteriti con*tra tabulas testamenti bonorum possessionem ex edicto petierint; nam exheredat*i* nullo modo repellunt patronum. Inst. 3, 7, 1.

of a moiety from the praetor. And if he die intestate, leaving as self-successor an adoptive son or a wife in his hand or a son's wife in the hand of his son, the patron can obtain in the same way against these self-successors intestate possession of a moiety from the praetor. But the freedman is enabled to exclude the patron if he leaves natural children, whether in his power at the time of his death or emancipated or given in adoption, provided he leaves them any portion of the inheritance, or that, being passed over in silence, they have demanded contra-tabular possession under the edict; for, if they are disinherited, they do not at all bar the patron.

§ 42. Postea lege Papia aucta sunt iura patronorum, quod ad locupletiores libertos pertinet. cautum est enim ea lege, ut ex bonis eius, qui sestertiorum *centu*m mili*um plurisue* patrimonium rel*iqu*erit, et pauciores quam tres liberos habebit, siue is testamento facto siue intestato mortuus erit, uirilis pars patrono debeatur. itaque cum unum filium unamue filiam heredem reliquerit libertus, proinde pars dimidia patrono debetur, ac si sine ullo filio filiaue moreretur; cum uero duos duasue heredes reliquerit, tertia pars debet*ur*; si tres relinquat, repellitur patronus. Inst. 3, 7, 2.

§ 42. At a still later period the lex Papia Poppaea augmented the rights of the patron against the estate of more opulent freedmen. For by the provisions of this statute whenever a freedman leaves property of the value of a hundred thousand sesterces and upwards, and not so many as three children, whether he dies testate or intestate, a portion equal to that of a single child is due to the patron. Accordingly, if a single son or daughter survives, half the estate is claimable by the patron, just as if the freedman had died childless; if two children inherit, a third of the property belongs to the patron; if three children survive, the patron is excluded.

§ 43. In bonis libertinarum nullam iniuriam antiquo iure patiebantur patroni. cum enim hae in pat*ro*norum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque

§ 43. In respect of the property of freedwomen no wrong could possibly be done to the patron under the ancient law: for, as the patron was statutory guardian of the freedwoman, her will was not valid without his sanction, so that,

siue auctor ad testamentum faciendum factus *erat* ———| relic*t* ——— |ctus erat, *seque*batur hereditas; si uero auctor| ei fa*ctus* non erat, et intestata liberta morieba*tur*, | ad ——— *per*|tinebat; nec enim ullus *oli*m ——— possit patronum a bonis lib*ertae* —— *re*|pellere.

if he sanctioned a will, he either would be therein instituted heir, or, if not, had only himself to blame: for if he did not sanction a will and consequently the freedwoman died intestate, he was assured of the inheritance, for she could leave no heres or bonorum possessor who could bar the claim of the patron.

§ 44. Sed postea lex Papia cum quattuor liberorum iure libertinas tutela patronorum liberaret et eo modo concederet eis etiam sine tu|toris auctoritate *condere testamentum*, *prospexit*, | ut pro numero libero*rum*, *quos liberta mortis tempo*|re habuerit, uirilis pars patrono debeatur. er|go ex bonis eius quae ———| liberos reli ———|a possid ———| *hereditas* ad patronum pertinet.

§ 44. But when at a subsequent period, by the enactment of the lex Papia, four children were made a ground for releasing a freedwoman from the guardianship of her patron, so that his sanction ceased to be necessary to the validity of her will, it was provided by that law that the patron should have a claim to a portion of her estate equal to that of each single child she might have at the time of her death. So if a freedwoman left four children, a fifth part of her property went to her patron, but if she survived all her children, the patron on her decease took her whole property.

§ 45. Quae diximus de patrono, eadem intellegemus et de filio patroni; item de ne*pote* *ex* filio ⟨*et de*⟩ pronepot*e ex nepote fili*o nato pro*gn*ato.

§ 45. What has been said of the patron applies to a son of the patron, a grandson by a son, a great-grandson by a grandson by a son.

§ 46. Filia uero patroni et *neptis* ex filio et pronep*tis ex* nepote filio nat*o* progna*ta* ol*im* qui*dem eo iure*, *quod l*ege XII tabularum | patrono datum est, ——— sex*us* | patronorum libero*s* ——— testamenti liberti ⟨*aut*⟩ ab intestato contra filium adoptiuum uel uxorem nurumue quae in manu fuerit, bonorum possessionem petat, trium liberorum iure lege Papia consequitur; aliter hoc ius non habet.

§ 46. Although a daughter of a patron, a granddaughter by a son, a great-granddaughter by a grandson by a son have under the statute of the Twelve Tables identical rights with the patron, the praetorian edict only calls the male issue to the succession: but the lex Papia gives a daughter of the patron a contra-testamentary or intestate claim against an adoptive child, or a wife, or a son's wife to a moiety of the inheritance on account of the privilege of being mother of three children; a daughter not so privileged has no claim.

§ 47. Sed ut ex bonis libertae testatae quattuor liberos habentis uirilis pars ei debeatur, ne liberorum quidem iure consequitur, ut quidam putant. sed tamen intestata liberta mortua uerba legis Papiae faciunt, ut ei uirilis pars debeatur. si uero testamento facto mortua sit liberta, tale ius ei datur, quale datum est contra tabulas testamenti liberti, id est quale et uirilis sexus patronorum liberi contra tabulas testamenti liberti habent; quamuis parum diligenter ea pars legis scripta sit.

§ 47. In the succession to a testate freedwoman mother of four children, a patron's daughter, though mother of three children, is not, as some think, entitled to the portion of a child: but, if the freedwoman die intestate, the letter of the lex Papia gives her the portion of a child; if the freedwoman die testate, the patron's daughter has the same title to contra-tabular possession as she would have against the will of a freedman, that is, as the praetorian edict confers on a patron and his sons in respect of the property of a freedman, [viz. a claim to half against all but natural children] though this portion of the law is carelessly written.

§ 48. Ex his apparet *ex*traneos heredes patronorum longe remot*os esse* ab om*n*i eo iure, quod uel in *in*testatorum bonis uel *contr*a tabulas testamenti patrono conpetit.

§ 48. It is thus apparent that the external heirs of a patron are entirely excluded from the rights which the law confers on the patron himself, whether a freedman die intestate or it is a question of the freedman's will being set aside by the praetor in favour of the patron.

§ 49. Patronae olim ante legem Papiam hoc solum ius habebant in bonis libertorum, quod etiam patronis *e*x lege XII tabularum datum est. nec enim ut contra tabulas te*sta*menti ingrati liberti uel ab intestato contra filium adoptiuum uel uxorem nurumue bonorum possessionem partis dimidiae peterent, praetor similiter ut de patrono liberisque eius curabat.

§ 49. Before the lex Papia was passed, patronesses had only the same rights in the property of their freedmen as patrons enjoyed under the statute of the Twelve Tables: for neither did the praetor intervene to give them a moiety of the inheritance by contra-tabular possession against a will of an ungrateful freedman, nor by making a grant of possession against the intestate claim of an adoptive child or a wife or a son's wife, as he did in the case of the patron and the patron's son.

§ 50. Sed lex Papia duobus liberis honora*ta*e ingenuae patronae, libertinae tribus, eadem fere iura dedit, quae ex edicto praetoris patroni habent; trium uero liberorum iure honoratae

§ 50. But subsequently by the lex Papia two children entitle a freeborn patroness, three children a patroness who is a freedwoman, to nearly the same rights as the praetor's edict confers on a patron;

ingenuae patronae ea iura dedit, quae per eandem legem patrono data sunt; libertinae autem patronae non idem iuris praestitit.

and it also provided that three children entitle a freeborn patroness to the same rights which the statute itself conferred on a patron: but the statute does not grant these latter rights to a patroness who is a freedwoman.

§ 51. Quod autem ad libertinarum bona pertinet, siquidem intestatae decesserint, nihil noui patronae liberis honoratae lex Papia praestat. itaque si neque ipsa patrona neque liberta *capite deminuta* sit, ex lege XII tabularum ad eam hereditas pertinet et excluduntur libertae liberi; quod iuris est etiam si liberis honorata non sit patrona; numquam enim, sicut supra diximus, feminae suum heredem habere possunt. si uero uel huius uel illius capitis deminutio interueniat, rursus liberi libertae excludunt patronam, quia legitimo iure *capitis deminutione perempto* euenit, ut liberi libertae cognationis iure potiores habean*tur*.

§ 51. As to the successions of freedwomen who die intestate, no new right is conferred on a patroness through the title of children by the lex Papia; accordingly, if neither the patroness nor the freedwoman has undergone a capitis deminutio, the law of the Twelve Tables transmits the inheritance to the patroness, and excludes the freedwoman's children, even when the patroness is childless; for a woman, as before remarked, can never have a self-successor: but if either of them has undergone a capitis deminutio, the children of the freedwoman exclude the patroness, because her statutory title having been obliterated by capitis deminutio, the children of the freedwoman are admitted by right of kinship in preference to her.

§ 52. Cum autem testamento facto moritur liberta, ea quidem patrona quae liberis honorata non est nihil iuris habet contra liber*tae* testamentum; e*i* uero quae liberis honorata *est* hoc ius tribuitur per legem Papiam, quod habet ex edicto patronus contra tabulas liberti.

§ 52. When a freedwoman dies testate, a patroness not entitled by children has no right of contra-tabular possession: but a patroness entitled by children has conferred upon her by the lex Papia the same right to a moiety by contra-tabular possession as the praetorian edict confers on the patron to the inheritance of a freedman.

§ 53. |Eadem lex patronae filio liberis honorato *f*ere| patroni iura dedit; sed in huius persona etiam unius filii filiaeue ius sufficit.

§ 53. By the same law a patroness's son privileged by having children has almost the rights of a patron [patroness?], but in this case one son or daughter is sufficient to give him the privilege.

§ 54. Hactenus omnia iura quasi per indicem tetigisse satis est; alioquin diligentior inter-

§ 54. This summary indication of the rules of succession to freedmen and freedwomen who are

pretatio propriis commentariis exposita est.

Roman citizens may suffice for the present occasion: a more detailed exposition is to be found in my separate treatise on this branch of law.

§ 54. Gaius wrote a treatise in fifteen books, Ad leges Juliam et Papiam, from which there are thirty extracts in the Digest; another in ten books, Ad edictum urbicum; and another in three books, De manumissionibus: to any of which he may allude, but more probably to the first.

§ 55. Sequitur ut de bonis Latinorum libertinorum dispiciamus.

§ 56. Quae pars iuris ut manifestior fiat, admonendi sumus, id quod alio loco diximus, eos qui nunc Latini Iuniani dicuntur olim ex iure Quiritium seruos fuisse, sed auxilio praetoris in libertatis form*a* seruari solitos; unde etiam res eorum peculii iure ad patronos pertinere solita est; postea uero per legem Iuniam eos omnes, quos praetor in libertat*e* tuebatur, liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse uoluit atque [si essent ciues Romani ingenui] qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt; Iunianos ideo, quia per legem Iuniam liberi facti sunt[, etiamsi non essent ciues Romani]. legis itaque Iuniae lator cum intellegeret futurum, ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent, quia *scilicet* neque ut serui decederent, ut possent iure peculii res eorum ad patronos pertinere, neque liberti Latini hominis bon*a* possent manumissionis iure ad patronos pertinere, necessarium existimauit, ne bene-

§ 55. We proceed to the successions of Latini Juniani.

§ 56. To understand this branch of law we must recollect what has been already mentioned (1 § 22), that those who are called Latini Juniani were originally slaves by law of the Quirites, though maintained by the praetor's protection in a condition of de facto freedom, so that their possessions belonged to their patrons by the title of peculium. At a more recent period, when the lex Junia was enacted, those whom the praetor had protected in de facto freedom became legally free, and were called Latini Juniani: Latini, because the law intended to assimilate their freedom to that of freeborn citizens of Rome who, on quitting Rome for a Latin colony, became Latin colonists; Juniani, because their liberty was due to the lex Junia, although it did not make them Roman citizens: and as the author of the lex Junia foresaw that the effect of this fiction of their being on the same footing as Latini coloniarii would be that the goods of deceased Latini Juniani would cease to belong to the patron, since not being slaves at the time of their death, their goods would not belong to the patron by right of peculium, nor could the goods of a Latin colonist

ficium istis datum in iniuriam patronorum conuerteretur, cauere [uoluit], ut bona eorum proinde ad manumissores pertinerent, ac si lex lata non esset; itaque iure quodammodo peculii bona Latinorum ad manumissores ea lege pertinent.

devolve on him by title of manumission; he deemed it necessary, to prevent the favour to these freedmen from becoming a wrong to the patron, to provide that their goods should belong to the manumitter in the same way as if the law had not been enacted. Consequently by that enactment the property of Latini Juniani belongs to their manumitters as if it were by right of peculium.

§ 57. *Vn*de accidit ut longe differant ea iura, quae in bonis Latinorum ex lege Iunia constituta sunt, ab his quae in hereditat*e* ciuium Romanorum libertorum obseruantur.

§ 57. Accordingly there are wide differences between the title to the property of Latini Juniani under the lex Junia and the title to the inheritance of freedmen who are Roman citizens.

§ 58. Nam ciuis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet; ad filium autem patroni nepotesque ex filio et pronepotes ex nepote ⟨*filio nato*⟩ prognatos omni modo pertinet, etiamsi ⟨*a*⟩ parente fuerint exheredati. Latinorum autem bona tamquam peculia seruorum etiam ad extraneos heredes pertinent, et ad liberos manu*missoris* exheredatos non pertinent.

§ 58. When a freedman, who is a Roman citizen, dies, an external heir of the patron has no claim to his inheritance, while a son of the patron, a grandson by a son, a great-grandson by a grandson by a son, have an indefeasible claim even if disinherited by their parent; whereas, when a Latinus Junianus dies, his property belongs to his patron's external heir, like the peculium of a slave, and does not belong to the manumitter's children who are disinherited.

§ 59. Item *ciuis* R*omani liberti* hereditas ad duos pluresue patronos aequaliter pertinet, licet dispar in eo seruo dominium habuerint; bona uero Latinorum pro ea parte pertinent, pro qua parte quisque eorum dominus fueri*t*.

§ 59. Thus the inheritance of a freedman, who is a Roman citizen, belongs to two or more patrons in equal portions, in however unequal proportions they had been his proprietors; whereas the goods of a Latinus Junianus belong to his patrons according to their shares in him when he was a slave.

§ 60. Item in hereditate ciuis Romani liberti patronus alterius patroni filium excludi*t*, et filius patroni alterius patroni nepotem repellit; bona autem Latinorum [et ad ipsum patronum] et *ad* alterius patroni heredem

§ 60. Again, in the succession to a freedman who is a Roman citizen, one patron bars another patron's son, and a son of one patron bars another patron's grandson; whereas the goods of a Latinus Junianus belong jointly

simul pertinent, pro qua parte ad ipsum manumissorem pertinerent.

both to a patron and another patron's heir, the latter taking the share which would have belonged to the manumitter he represents.

§ 61. Item si unius patroni tres forte liberi sunt et alterius unus, hereditas ciuis Romani liberti in capita diuiditur, id est tres fratres tres portiones ferunt et unus quarta*m*; bona uero Latinorum pro ea parte ad successores pertinent, pro qua parte ad ipsum manumissorem pertinerent.

§ 61. If one patron leave three children, and another patron one, the inheritance of a freedman who was a Roman citizen is divided by the number of individuals (in capita); that is to say, every one takes an equal portion; whereas the goods of a Latinus Junianus belong to those who succeed in the proportion in which they would have belonged to the manumitters they represent.

§ 62. Item si alter ex his patronis suam partem in heredita*te* ciuis Romani liberti spernat, uel ante moriatur quam cernat, tota hereditas ad alterum pertinet; bona autem Latini pro parte de*fici*entis patroni caduca fiunt et ad populum pertinent.

§ 62. If one patron renounce his part in the inheritance of a freedman who was a Roman citizen, or die before formal acceptance (cretio), the whole inheritance belongs to the other; but the share of the property of a Latinus Junianus which a patron fails to take is caducous and belongs to the people (aerarium).

§ 63. Postea Lupo et Largo consulibus senatus censuit, ut bona Latinorum primum ad eum pertinerent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, uti quisque proximus esset; tunc antiquo iure ad heredes eorum qui liberassent pertinerent.

§ 63. At a later period, when Lupus and Largus were consuls, the senate decreed that the goods of a Latinus Junianus should belong in the first place to the manumitter, in the next to such issue of the latter as are not individually disinherited, in the order of their proximity, and, in default of these, by the ancient law of devolution, to the heirs of those manumitting them.

§ 64. Qu*o* senatusconsulto quidam ⟨*id*⟩ actum esse putant, ut in bonis Latinorum eodem iure utamur, quo utimur in hereditate ciuium Romanorum libertinorum. *id*que maxime Pegaso placuit. quae sententia aperte falsa est. nam ciuis Romani liberti hereditas numquam ad extraneos patroni heredes pertinet, bona autem

§ 64. The effect of this senatusconsult is, according to some authorities, that the goods of a Latinus Junianus devolve in the same way as the inheritance of a freedman who was a Roman citizen, and this was the doctrine of Pegasus: but this opinion is clearly erroneous, for the inheritance of a freedman who is a Roman citizen never belongs to an external heir of his patron;

Latinorum [etiam] ex hoc ipso senatusconsulto non obstantibus liberis manumissoris etiam ad extraneos heredes pertinent. item in hereditate ciuis Romani liberti liberis manumissoris nulla exheredatio nocet, in bonis Latinorum nocere nominatim factam exheredationem ipso senatusconsulto significatur.

whereas the goods of a Latinus Junianus, by the express terms of the senatusconsult, in default of children of the manumitter devolve on his external heir. Again, in the case of the inheritance of a freedman who was a Roman citizen, the children of the manumitter are not injuriously affected by any form of disinheritance; whereas Latini Juniani, in respect of their goods, are injured by individual disinheritance according to the very terms of the senatusconsult.

§ 64 *a*. Verius est ergo hoc solum eo senatusconsulto actum esse, ut manumissoris liberi, qui nominatim exheredati non sint, praeferantur extraneis heredibus.

§ 64 *a*. The only true effect, then, of the senatusconsult is, that the manumitter's children in the absence of individual disinheritance are preferred to external heirs.

§ 65. Itaque emancipatus filius patroni praeteritus quamuis contra tabulas testamenti parentis sui bonorum possessionem non petierit, tamen extraneis heredibus in bonis Latinorum potior habetur.

§ 65. Accordingly, an emancipated son of the patron who is passed over in silence by his father, though he makes no demand for contra-tabular possession, is nevertheless preferred to an external heir in respect of the goods of a Latinus Junianus.

§ 66. Item filia ceterique sui heredes licet iure ciuili inter ceteros exheredati sint et ab omni hereditate patris sui summoueantur, tamen in bonis Latinorum, nisi nominatim a parente fuerint exheredati, potiores erunt extraneis heredibus.

§ 66. Again, a daughter and other self-successors who can be disinherited at civil law in a mass (inter ceteros) and thereby effectively deprived of the inheritance of their parent, in respect of the goods of a Latinus Junianus, unless they are individually (nominatim) disinherited, have priority over an external heir.

§ 67. Item ad liberos, qui ab hereditate parentis se abstinuerunt, nihilo minus bona Latinorum pertinent; *nam hi quoque* exheredati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt.

§ 67. Children, too, although they have abstained from the inheritance of their parent, are entitled to the goods of his Latinus Junianus in spite of their abstention, because they cannot be said to have been disinherited any more than children who are passed over by a testator in silence.

§ 68. Ex his omnibus satis illud apparet, si is qui Lati-

§ 68. From all these points it is sufficiently apparent that he

nu*m* | fecerit, ——|——| —sse; hunc enim solum —— in bonis Latino*rum* ——| (4 *uersus in C legi nequeunt*) ——| quaeritur, an exheredes ——|—— (5 *uersus in C legi nequeunt*) ——| et libe ——| ——|— constat ——|—— bona Latinorum ——|— est ut ——|——|——|—— ab alteri ——|.

who makes a Latinus Junianus . . .

§ 69. Item illud quoque constare uidetur, si solos liberos ex | disparibus partibus patron*us* ——|—— tant, ad eos pertinere, quia nullo interueniente extraneo herede senatusconsulto locus non est.

§ 69. This also seems to be established, that if a patron has instituted his children as his sole heirs but in unequal portions, the property of a Latin belongs to them in the same unequal proportions, because in the absence of an external heir the senatusconsult has no application.

§ 70. *Sed* si cum liberis suis etiam extraneum heredem patronus reliquerit, *Ca*elius Sabinus ait tota bona pro uirilibus partibus ad liberos defuncti pertinere, quia cum extrane*us* heres interuenit, non habet lex Iunia locum, sed senatusconsultum. Iauolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro uirilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas uero partes pro hereditariis partibus ad eos pertinere.

§ 70. If the children of the patron are left joint heirs with a stranger, Caelius Sabinus holds, that the entire goods of a Latinus Junianus devolve in equal portions on the children, because when an external heir intervenes he is brought within the senatusconsult instead of the lex Junia. According to Javolenus, only that part will devolve under the senatusconsult in equal portions on the children of the patron, which, before the senatusconsult was passed, the external heir would have been entitled to under the lex Junia, and the residue will belong to them in the proportion of their shares in their father's inheritance.

§ 71. Item quaeritur, an hoc senatusconsultum ad eos patroni liberos pertineat, qui ex filia nepteue procreantur, id est ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. item ⟨*an*⟩ ad maternos Latinos hoc senatus-

§ 71. It is a further question, whether this senatusconsult extends to descendants (liberi) of the patron born of a daughter or granddaughter of a patron, that is whether in respect of the goods of a Latinus Junianus a grandson by a daughter will be

consultum pertineat quaeritur, id est ut in bonis Latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. sed huius sententiam plerique inprobant, quia senatus de his liberis [patronarum] nihil sentiat, qui aliam familiam sequerentur. idque ex eo apparet, quod nominatim exheredatos summo*uet*; nam uidetur de his sentire qui exheredari a parente solent, si heredes non instituantur; neque autem matri filium filiamue, neque auo materno n*e*potem neptemue, si eum eamue heredem non instituat, exheredare necesse est, siue de iure ciuili quaeramus, siue de *e*dicto praetoris, quo praeteritis liberis contra tabulas testamenti bonorum possessio promittitur.

preferred to an external heir. Again, it is a question whether a Latinus Junianus belonging to a mother is within the senatusconsult, that is, whether in respect of the goods of a Latinus Junianus, manumitted by a mother, preference is given to the patroness' son over her external heir. Cassius held that both cases are within the scope of the senatusconsult; but his opinion is generally rejected on the ground that the senate could not contemplate the benefit of patronesses' sons; persons, that is, in another civil family to that of the manumitter; and this appears to be the true interpretation of the senatusconsult from its making individual disinheritance a bar; for herein the senate appears to contemplate those who must be disinherited by their parent if they are not instituted. Now a mother need not disinherit her child, nor a mother's father a grandchild, in default of institution, whether we look to the civil law or to that part of the praetorian edict which promises contra-tabular possession to children passed over by a testator in silence.

§ 72. Aliquando tamen ciuis Romanus libertus tamquam Latinus moritur, uelut si Latinus saluo iure patroni ab imperatore ius Quiritium consecutus fuerit. nam, ut diuus Tr*a*ianus constituit, si Latinus inuito uel ignorante patrono ius Quiritium ab imperatore consecutus sit, [quibus casibus] dum uiuit iste libertus, ceteris ciuibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liberi eius hered*es* esse possunt; et in hoc

§ 72. Sometimes a freedman, who is a Roman citizen, dies as a Latinus Junianus; for instance, a Latinus Junianus who has obtained an imperial grant of citizenship, reserving the rights of his patron: for by a constitution of the emperor Trajan a Latinus Junianus who obtains an imperial grant of citizenship against the will or without the knowledge of his patron resembles during his lifetime other freedmen who are Roman citizens, and procreates lawful children, but dies with the status

tantum habet testamenti factionem, *ut* patronum heredem instituat eiqu*e*, si heres esse noluerit, alium substituere possit.

of a Latinus, so that his children are not his heirs; and has only this amount of testamentary capacity that he may institute his patron heir, and name a substitute to him in case of his renouncing the inheritance.

§ 73. Et quia hac constitutione uidebatur effectum, ut ne umquam isti homines tamquam ciues Romani morerentur, quamuis eo iure postea *u*si essent, quo uel ex lege *Aelia* Sentia uel ex senatusconsulto ciues Romani essent, diuus Hadrianus iniquitate rei motus auctor fuit senatusconsulti *f*aciendi, ut qui ignorante uel recusante patrono ab imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex lege Aelia Sentia uel ex senatusconsulto, si Latini ma*nsi*ssent, ciuitatem Romanam consequerentur, proinde ipsi haberentur ac si lege Aelia Sentia uel senatusconsulto ad ciuitatem Romanam peruenissent.

§ 73. But as the effect of this constitution seemed to be, that such a person could never die as if he were a Roman citizen, even though he subsequently acquired the title to which the lex Aelia Sentia or the senatusconsult (1 § 31) annexes the right of Roman citizenship, the emperor Hadrian, to mitigate the harshness of the law, caused to be passed a senatusconsult, that a freedman, who obtained from the emperor a grant of citizenship without the knowledge or contrary to the will of his patron, on subsequently acquiring the title to which the lex Aelia Sentia or the senatusconsult, if he had remained a Latinus Junianus, would have annexed the rights of Roman citizenship, should be deemed to be in the same position as if he had acquired Roman citizenship by the title of the lex Aelia Sentia or the senatusconsult.

§ 74. Eorum autem, quos lex Aelia Sentia dediticiorum numero facit, bona modo quasi *ciuium Romanorum* lib*er*torum, modo quasi Latinorum ad patronos pertinent.

§ 74. The property of those who under the lex Aelia Sentia are counted as if they were surrendered enemies devolves on their patrons sometimes as if they were freedmen who had Roman citizenship, sometimes as if they were Latini Juniani.

§ 75. Nam eorum bona qui, s*i* in aliquo uitio non essent, manumissi ciues Romani futur*i* essent, quasi ciuium Romanorum patronis eadem lege tribuuntur. non tamen *h*i habent etiam testamenti factionem; nam id

§ 75. For the goods of those of them who, but for some offence, would have obtained on manumission Roman citizenship are given by this statute to their patrons like freedmen who became Roman citizens by the

plerisque placuit, nec inmerito: nam incredibile uidebatur pessimae condicionis hominibus uoluisse legis latorem testamenti faciendi ius concedere.

provision of the above-mentioned statute; but, according to the prevalent and better opinion, they cannot make a will; for it seems incredible that the most abject order of freedmen should have been intended by the legislator to enjoy the power of testamentary disposition.

§ 76. Eorum uero bona qui, si non in aliquo uitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latin*i* decessissent. nec me praeterit non satis in ea re legis *l*atorem uoluntatem suam uerbis expres*si*sse.

§ 76. But the goods of those who, but for some offence, would have become on manumission Latini are assigned to their patrons as if they were the goods of Latini, though, as I am aware, the legislator has not expressed his intention in this matter in terms as unequivocal as might be desired.

§ 59. It was an arbitrary rule of Roman jurisprudence that rights of patronage were not divisible in unequal portions (placuit nullam esse libertorum divisionem, Dig. 37, 14, 24), that is, that several joint proprietors of a slave in unequal portions acquired by his manumission equal rights as joint patrons against his succession.

§ 60. The rights of patrons were modelled on those of agnates, and we know that only the nearest agnate was entitled to succeed. Therefore on the decease of one of several joint patrons his rights accrued to the remainder by survivorship. But the peculium of a slave belongs to his co-proprietors in the ratio of their property, and on the decease of one, his rights do not accrue to the co-proprietors, but are transmitted to the representatives of the deceased.

§§ 63-71. Cf. Inst. Just. 3, 7, 4. The Sc. Largianum was passed under the Emperor Claudius, A. D. 42.

The Sc. Largianum giving a right to the children of the patron, in respect of the property of Latini Juniani deceased, put them all on a footing of equality like manumitting joint proprietors, § 59, but it only took effect when a stranger was instituted heir or co-heir; if then a patron left his whole inheritance to his children, but in unequal portions, their rights to the succession of a Latinus Junianus would be governed by the older law, and would be proportionate to their shares in their father's succession.

§§ 74-76. Cf. 1, 25. Ulpian gives as a reason why Dediticius could not make a will his want of citizenship both at Rome and in every other state: Latinus Junianus, item is qui dediticiorum numero est, testamentum facere non potest; Latinus quidem quoniam nominatim

lege Junia prohibitus est; is autem qui dediticiorum numero est, quoniam nec quasi civis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae civitatis civis est, ut secundum leges civitatis suae testetur, 20, 14. This requires some explanation; and the explanation may serve to illustrate all those passages of Gaius, e.g. 1 § 92, where he alludes to the laws of civitates peregrinae.

At the close of the republic, and during the first centuries of the empire, all Italy, with the exception of Rome, was composed of a number of townships; each with its own territorial limits, and each possessed of its own constitution, magistrates, jurisdiction, and, to a certain extent, legislation. In the lex Julia municipalis, preserved on the tabula Heracleensis, these townships are called Coloniae when they had been founded as colonies from Rome, Municipia when they traced their existence to some other origin. The provinces, though originally very variously constituted, were gradually assimilated in condition to Italy and its towns: so that finally the whole empire was composed of municipalities, and almost all of its free inhabitants were either citizens of Rome or of some local and inferior community.

The generic denomination of these communities, whether Italian or Provincial, was Civitas or Respublica. The term Municipium was sometimes used in this generic sense; but was more commonly used in a specific sense as opposed to Colonia. Municipes, however, is often used in the generic sense where we might have expected Municipium; as equivalent to Respublica or Civitas. It is also often used to signify generically, not a state or juristic person (municipium), but its individual members; i.e. as equivalent to cives, in speaking of any town but Rome: as the word Civis, from its habitual opposition to Latinus and Peregrinus, had acquired a tendency to suggest civis Romanus. The area belonging to each town was called Regio or Territorium, and included under one jurisdiction all the Vici within its geographical limits.

Citizenship (civitas, patria, origo) in any municipality was producible by four causes: Municipem aut nativitas facit, aut manumissio, aut adoptio, Dig. Ad Municipalem et de Incolis, 50, 1, 1, pr. Cives quidem origo, manumissio, adlectio, adoptio; incolas vero . . . domicilium facit, Cod. 10, 40, 7.

(1) Birth (origo, nativitas) was the commonest title; and hence the word origo is used as equivalent to civitas. Children born in marriage had the civitas of their father; those not so born of their mother. Some states had the privilege that children born in lawful marriage of parents belonging to different communities should have the civitas of the mother in addition to that of the father.

(2) Adoptio gave to the adopted child, in addition to his original civitas, that of his adoptive father.

(3) Manumissio, when perfect, gave to the freedman the civitas of his patronus.

(4) Adlectio, election by the governing body of a community, admitted strangers to civitas.

It follows that a man might be a citizen of several states; of one by origo, another by adoptio, another by adlectio. This may seem to be contradicted by Cicero: Duarum civitatum civis esse noster jure civili nemo potest, Pro Balbo, 11, 28: but Cicero is here speaking of independent sovereign states; not of the dependent states composing the organism of the Roman empire.

When Roman citizenship had been granted to all Italy, and an ordinance of Caracalla, subsequent to the time of Gaius, had extended it to all the Provinces, every member of any municipality possessed at least a double citizenship: he was citizen of Rome as well as of the smaller municipality: Omnibus municipibus duas esse censeo patrias, unam naturae, alteram civitatis . . . habuit alteram loci patriam, alteram juris, Cicero, De legibus, 2, 2. Roma communis nostra patria est, Modestinus, Dig. 50, 1, 33.

The principal effects of citizenship in a municipality were threefold:

(1) Obligation to bear certain burdensome municipal offices (munera);

(2) Subjection or obligation of submission to the municipal magistrates and tribunals, including liability as defendant to be sued before its courts (forum originis);

(3) Subjection to municipal laws, including the determination of a man's personal capacity—infancy, minority, majority, capacity of disposition, &c.—by the laws of the community in which he had civitas (lex originis).

In all these effects a man's Roman citizenship was of slight importance compared with his municipal citizenship. The burdens (munera) of the metropolitan city were provided for by arrangements peculiar to Rome. The liability of a defendant to be sued before a Roman forum was limited to the time when he happened to be resident in Rome, and then was subject to many exceptions, included under the general name of jus revocandi domum: and in any case of collision between the laws relating to personal capacity, the laws of Rome always yielded to those of the local patria or father town (lex originis).

In most of the above consequences Domicil (domicilium, incolatus, domus) had an operation similar to civitas. Domicil is the place which a man has voluntarily chosen for his residence, as

the central station of his fortunes, and the headquarters of his dealings and dispositions: Incolas vero . . . domicilium facit. Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit, Cod. 10, 40, 7. 'Home is identical with Domicil; and Domicil is agreed to be the place where a man has established his household gods and the headquarters of his transactions and obligations: the place which he will not leave except for a special purpose; absence from which makes him seem to be abroad, and return to which makes him cease to be any longer away from home.' Sed de ea re constitutum esse (respondit), eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet suarumque rerum constitutionem fecisset, Dig. 50, 16, 203. 'It is undisputed that a man's home is the place where he is settled and has his counting-house (account-books) and the basis of his operations (or, centre of gravitation of his fortunes).' In exceptional cases a person's domicil might be determined, not by choice, but by his circumstances: thus children acquired the domicil of their parents, and soldiers were domiciled in the place where they were stationed. It was possible for a person to have more than one domicil, though this was a subject of controversy.

A man was liable to munera of the city which he had chosen for a domicil as well as of that where he had the rights and duties of citizenship. Domicil, as well as Origo, constituted a man's general forum; that is, in any action in which a man was defendant, the plaintiff had the election whether he would sue him at his forum originis or forum domicilii. A party to an action can only be governed by one Lex: and if he was citizen in any municipality, he was, generally speaking, governed by lex originis; if he was nowhere citizen, his relations may be governed by lex domicilii.

The subversion of the Roman empire in the west abolished the importance of the Municipalities; and, with the exception of Switzerland where it still prevails, the doctrine of Origo disappeared from those countries which are still influenced by Roman jurisprudence. Traces of the Roman doctrine of Domicilium still survive, at least as to Forum and Lex, in the Private international law of some states: what related to Munera shared the fate of the other political institutions of the empire. Savigny, §§ 350-359.

We may observe that the reason assigned by Ulpian for the incapacity of Dediticius to make a will, his want of patria, requires explanation: for, if he had no patria, at least he might have domicilium, though not in Rome or within a certain distance from it, and

we have seen that, in the absence of patria, a man's personal capacity was to some extent determined by his domicilium. It may be, however, that the equivalence of domicilium to patria did not necessarily extend to testamentary capacity. The modern maxim: Locus regit actum, 4 § 53, comm., the ability of even temporary residence, as opposed to domicil, to give validity to the mere form of a disposition if made in accordance with the law prevalent there, is not a recognized principle of Roman law itself.

The third class of freedmanship (dediticia libertas) had long been obsolete when it was formally abolished by Justinian, A.D. 530, Cod. 7, 5.

The second class (latinitas), under which the freedman relapsed into servitude at the moment of death, was also offensive to Roman feelings in imperial times, and was formally abolished by Justinian, the principal modes of creating latinitas being transformed into modes of acquiring quiritary status or civitas Romana, and the remainder being declared inoperative, Cod. 7, 6.

The rules of succession to intestate freedmen of the first class, the only class henceforth recognized, were immensely simplified by Justinian. While he abolished the last remnants of the lex Papia, and amongst them the rights which that law gave to the patron against the heritage of Centenarius, or the freedman who died worth 100,000 sesterces, or what Justinian treated as equivalent, 100 aurei, he confined the rights of the patron to inheritances of that amount, that is to say, he exempted from the claims of the patron, contra-tabular or ab intestato, all estates left by a freedman below the value of 100 aurei. Against such estates as remained liable, moreover, he reduced the claims, contra-tabular or ab intestato, of the patron from $\frac{1}{2}$ to $\frac{1}{3}$.

Patrons were protected against fraudulent alienations by the freedman in his lifetime in two ways. Alienations which reduced the fortune of the freedman below the specified limit (made the freedman minorem centenario) were deemed to be in fraudem legis, and were ipso jure null and void: alienations which, without making the freedman minorem centenario, diminished the amount of the $\frac{1}{3}$ to which the patron was entitled, were valid at law, but were rescinded by the patron's action against the alienee. If the freedman died testate, the patron employed against the alienee the formula Fabiana; if he died intestate, the formula Calvisiana. These actions were analogous to the actio Pauliana, the creditors' remedy in the case of alienations in fraudem creditorum. Fraudulent alienations by manumission, whether in fraudem creditorum or in fraudem patroni, were made null and void by the lex Aelia Sentia, 1 § 37.

The patron's remedy by actio Fabiana and actio Calvisiana may be compared with the remedy by Querela inofficiosae donationis; for the rights of a patron against the inheritance of the freedman were somewhat analogous to the rights of certain very near relations of the testator to his inheritance, unless a certain portion (debita, legitima portio) of the inheritance was left them in his will, and by the Querela inofficiosae donationis any gift he made which violated his duty to such relations in this respect could be set aside. While the will of the freedman could be upset by contra-tabulation (by interdictum quorum bonorum or petitio hereditatis possessoria), the testator's near relatives were allowed the Querela inofficiosi testamenti, with a fictitious allegation of the testator's insanity. The amount held sufficient to satisfy the rights of the two classes of claimants differed: while the patron was entitled to $\frac{1}{2}$, or, in later times, $\frac{1}{3}$ of the inheritance, a will was set aside for breach of family respect (pietas) unless a $\frac{1}{4}$ of what would have been the querelant's share in the event of intestacy was left him. In both cases the will of the testator, whether libertus or ingenuus, might be allowed to stand, so far as was consistent with the claims of the Querelant or Contra-tabulant; but while Contra-tabulation necessarily produced a violation of the rule, nemo pro parte testatus, pro parte intestatus, decedere potest, the Querela only produced it occasionally, as it often caused a complete rescission of the will, or total intestacy. Praeteriti liberi, i.e. neither instituti heredes nor exheredati, could also, if the will was not on this account entirely void, contra-tabulate like the patron: but the patron's ground of contra-tabulation, like the near relation's ground of querela, was a material wrong; whereas preterition of liberi was treated rather as an informality.

The rights of the patron against the freedman's estate were not only interesting to the freeborn Roman in his possible character of a patron, but also in respect of the manumission of children: for an emancipating parent (parens manumissor) had the same claims against the estate left by the emancipated child as the manumitter of a slave had against the estate left by the freedman, i.e. a claim originally to a moiety and subsequently to a third of the succession, either contra-tabular or ab intestato. He, however, could not bring actio Fabiana or Calvisiana to defeat dolose alienations made in the lifetime of the emancipated child.

In later times the multiplication of legally protected Peculia, castrense, quasi-castrense, &c., made emancipation very much less a matter of loss to the emancipating parent, and proportionally deprived of its strength his claim to the succession of his child. Hence we find that Novella 115, which recast the rules relating to inofficiositas, and Novella 118, which reformed intestate law,

abolished both the contra-tabular and the ab intestato rights of parens manumissor. Adolf Schmidt, Das Pflichttheilsrecht des Patronus und des Parens manumissor.

§ 77. Videamus autem et *de* ea successione quae nobis ex emptione bon*o*rum conpetit.

§ 77. We next proceed to succession of a vendee arising from the purchase of a debtor's entire property.

§ 78. Bona autem ueneunt aut uiuorum aut mortuorum: uiuorum ueluti eorum qui fraudationis causa latitant nec absentes defenduntur; item eorum qui ex lege Iulia bonis cedunt; item iudicatorum post tempus quod e*i*s parti*m* lege XII tabularum partim edicto praetoris ad expediendam pecuniam tribuitur. mortuorum bona ueneunt ueluti eorum, quibus certum est neque heredes neque bonorum possessores neque ullum alium iustum successorem existere.

§ 78. The entire property of a debtor may be sold either in his lifetime or after his death. It is sold in his lifetime when, for instance, he defrauds his creditors by absconding, and is absent and undefended, or when he avails himself of the lex Julia and makes a voluntary surrender of his estate, or when, after judgment recovered against him, he has suffered the term to expire that is prescribed, partly by the Twelve Tables, partly by the edict of the praetor, for the satisfaction of a judgment debt. A debtor's estate is sold after his death when it is certain that he has left neither an heir, nor a praetorian representative, nor any other lawful successor.

§ 79. Siquidem uiui bona ueneant, iubet ea praetor per dies continuos XXX poss*i*deri *e*t proscribi; si uero mortui, *per* dies XV. postea iubet conuenire creditores et ex eo numero magistrum creari, id est eum per quem bona ueneant. itaque si uiui bona ueneant, in diebus ⟨*x bonorum*⟩ u*endition*em fieri iubet, si mortui, in dimidio. *die*bus ita*que* uiui bona XXXX, mortui uero XX emptori addici iubet. quare autem tardius uiuentium bonorum uenditionem conpler*i* iubet, illa ratio est, quia de uiuis curandum erat, ne facile bonorum uenditiones paterentur.

§ 79. If the bankrupt whose estate is to be sold is alive, an order issues from the praetor, and his estate is possessed and advertised for sale for thirty continuous days; if the debtor is dead, it is possessed and advertised for fifteen days. After this delay a second order issues from the praetor, directing the creditors to hold a meeting and elect out of their number a manager, by whom the estate may be sold. And after the expiration of the ten days next following, if the debtor is alive, or of five if he is dead, a third order issues from the praetor, under which the sale of the property is held. Thus after the expiration of forty days if the debtor is alive, after the expiration of twenty if he is dead,

his universal estate is transferred by the creditors under the praetor's order to the purchaser. The longer delay prescribed for the sale of the estate of a living debtor is founded on the greater consideration due to the living than to the dead, and is designed to protect a living debtor from having his property sold too easily.

§ 80. Neque autem bonorum possess*orum* neque *bonorum emptorum res* pleno iure fiunt, sed in bonis efficiunt*ur; ex iure* Quiritium autem ita demum adquiruntur, si us*u*cepe*r*unt. interdum quidem bonorum emptoribus n*e* *u*|sus quidem capio contingit, ueluti si ——| bonorum emptor ——|——| ——|.

§ 80. Neither a praetorian successor nor a purchaser of a debtor's entire property acquires plenary, but only bonitarian, ownership. Quiritarian ownership is only acquired by usucapion, though sometimes a purchaser of a debtor's entire property cannot even acquire by usucapion (for instance, when a peregrinus is bonorum emptor).

§ 81. Item quae debi*ta sunt* ——| aut ipse debuit, neque bonorum possessor ne*que* | bo*no*rum emptor ipso iure debe*t* *aut ipsis debentur*, |— de omnibus rebus ——|—— *in* sequenti commentario pro|ponemus.

§ 81. Debts owed to or by the person from whom the property is derived are not owed to or by the praetorian successor or purchaser of a debtor's entire property, but are recoverable by fictitious forms of action, which will be explained hereafter [4 § 34].

§ 77. Missio in possessionem and the subsequent bonorum venditio bear a sort of general resemblance to the adjudication of bankruptcy and the sale of the debtor's property by the trustee in bankruptcy of English law, though in the latter system there is this among other differences, that the sale is not in the hands of the creditors themselves, but of a trustee appointed by the court and acting under its control.

In order to form a clear conception of this branch of the law, it is necessary to distinguish an ordinary judgment execution in a personal action, that is to say, the enforcement by the power of the state of a judgment debt against a debtor who omits to satisfy the judgment by voluntary payment, from bankruptcy, which is the process when all the property and liabilities of the debtor in default are brought into adjudication. The English process in an ordinary execution is either a writ of fieri facias, commanding the sheriff to satisfy the debt by seizure and sale of the personal goods of the

debtor; or a writ of levari facias, now disused, directing him to levy the debt out of the personal goods of the debtor, and the rents and profits of his land; or a writ of elegit, commanding him to deliver the debtor's goods to the creditor at an appraisement, or to put the creditor in possession of the debtor's land, to hold until out of the rents and profits thereof the debt is levied; or formerly, before imprisonment for debt was abolished, a writ of capias ad satisfaciendum, commanding him to imprison the body of the debtor until satisfaction was made for the debt. After a man's body was taken in execution, no other process could be sued out against his lands or his goods, and after his lands were seized by elegit, his body could not be taken, but if part only of the debt was levied on a fieri facias, the creditor might have a capias ad satisfaciendum for the residue. So that body and goods might be taken in execution, or land and goods, but not both body and land. None of these remedies, we may observe, includes the sale of the debtor's land. In the law of bankruptcy, on the contrary, which has grown up in comparatively modern times, the whole real as well as personal estate of the debtor is transferred to the creditors' trustee, to be sold or otherwise disposed of, for the benefit of the creditors; but the trustee, as we have seen, fulfils a public function, and is not a mere agent of the creditors.

It is to be noticed that ordinary execution for debt and bankruptcy are not distinctly separated from one another by Gaius, all judgment debtors alike being liable to bonorum venditio, though competing creditors are associated together in the realization of the debtor's estate.

In the early law the only general form of execution was personal (manus injectio), and when the praetor established a form of real execution it operated, whether at the instance of one, or of several creditors, as a transfer of the debtor's entire property to the vendee. But in course of time, owing to the inconvenience of this kind of execution in the case of single creditors, the practice of granting execution by which portions only of a debtor's property could be seized was adopted by the praetor and developed by imperial legislation. This was called pignoris capio, which is not to be confounded with the legis actio per pignoris capionem, of which Gaius subsequently gives an account, 4 § 26. A portion of the debtor's estate was thus seized, not by the plaintiff, as in the earlier procedure, but by public officers (the officiales, viatores, apparitores, executores of the magistrate), and after being detained two months to enforce payment by way of pledge, was sold in satisfaction of the debt. Movables were to be seized and sold in the first instance, but, if these were insufficient, lands might be seized and sold, Dig. 42, 1, 15.

If a purchaser could not be found, the property might be delivered to the creditor at an appraisement. In pignoris capio, however, there was only a singular succession to the debtor's property, which was taken in execution, there was no transfer of his juris universitas.

In order to understand the proceedings in bonorum emptio, or execution against the entire property of an insolvent debtor, the principal mode of execution at the time when Gaius wrote, we must study the earlier mode of execution by manus injectio, or process against the body of the debtor, which was one of the old legis actiones regulated by the Twelve Tables, 4 §§ 21–25, and which was the model on which proceedings in missio in possessionem, or process against an insolvent's estate, were regulated by subsequent praetorian legislation. These proceedings are known to us by the statements of Aulus Gellius, who has given us the very terms of the Twelve Tables, 20, 1. 'The following are the expressions of the law (Table III): Admitted debts and judgment debts shall be satisfied within a lawful term of thirty days. When these are elapsed let the creditor apprehend the debtor and take him before the magistrate. If he does not satisfy the judgment, and if no one takes upon himself the cause before the magistrates, binding himself to defend an action for the debt (eo in jure vindicit), let the creditor carry him away (secum ducito), and confine him in stocks or fetters of not less than 15 pounds weight. If the prisoner wishes, he may live on his own. If he does not, the creditor shall give him pounds of corn each day, or more if he likes.' Gellius proceeds to tell us that 'during a subsequent interval the debtor might agree with his adversary (erat autem jus interea paciscendi), but in default of an agreement was detained in chains for sixty days. During this period, on three continuous ninth or market-days he was taken before the praetor in the comitium, where the amount of the judgment debt was proclaimed (which would give his friends an opportunity of ransoming him). On the third market-day he was put to death, or sold into slavery beyond the Tiber. . . . On the third market-day, say the Twelve Tables, the creditors may cut their portions of his body, and no creditor who cuts too little or too much shall be therefore called to account' (cf. Gell. l. c. 48–52 dissectum esse antiquitus neminem equidem legi neque audivi. For various explanations of this curious passage cf. Roby, Private Law, 2, p. 424).

The excessive cruelty of creditors to their debtor bondsmen, one of the chief grievances of the plebeians, was restrained by the Lex Poetelia (313 B.C.). This law probably prevented them being sold as slaves beyond the Tiber. But it left untouched personal execution itself, imprisonment for debt remaining in force throughout the history of Roman law. But though personal execution was applicable

to all judicati, the lex Poetelia abolished it for nexum, Bethmann-Hollweg, Röm. Civ. Proc. § 112.

The assignment (addictio) of the insolvent borrower reduced him to a state of partial servitude. But the Roman lawyers distinguished between partial slavery (servire) and complete slavery (servum esse), Quintilian, 7, 3. For instance, the addictus retained his praenomen, nomen, cognomen, tribe, could by payment of his debt recover his liberty at any time without the consent of the creditor, and on recovery of his liberty was not libertinus but ingenuus. As, then, addictio did not reduce a freeman to slavery, it did not operate a degradation of status (capitis minutio).

Insolvency, however, deeply affected another branch of status, namely, civitas, although even here, as it only partially destroyed the privileges of civitas, it was not considered to operate a capitis minutio. Civitas, as we have seen, consisted of two portions, certain political or public rights, jus suffragii and jus honorum, and certain civil or private rights, collectively denominated commercium and connubium. The political half of civitas was destroyed by insolvency, which deprived a man of his electoral powers and his capacity for office, and reduced him to the condition of aerarius; and even the civil half was seriously impaired, and principally in respect of commercium. Of the aggregate of capacities called commercium the privilege forfeited by insolvency was the capacity of appointing or being appointed procurator, Inst. 4, 13, 11. By being disabled from appointing a procurator a man might be seriously hampered in his commercial proceedings, as he would be unable to cede a right of action; by being disqualified for acting as procurator he would be unable to acquire by cession a right of action, and would be unable to sue for a penalty as an informer in a popularis actio, 4 § 82, comm., for the prosecutor in such an action was considered to be the procurator of the people. The various privileges enjoyed by a citizen of untarnished credit, and liable to be forfeited by insolvency or otherwise, were called his existimatio, and the disabilities attaching to loss of existimatio were summed up in the word 'infamia' or 'ignominia.'

The early Civil law allowed, as we have seen, the body of the insolvent debtor to be pursued, but provided no direct process against his property. This want, which would be the more felt as Roman commerce extended, was at length supplied by the Praetor.

In close imitation of this execution against the body, a process of execution against the property of an insolvent was introduced by a praetor named Publius Rutilius, about a century before the Christian era, 4 § 35. It may be assumed from the parallelism of these proceedings that the interval of thirty days which was required

to elapse between the first seizure and the decree authorizing the election of a magister was derived from the thirty days' interval allowed the judgment debtor before manus injectio.

The process was begun by missio in possessionem, whereby the praetor gave persons, who had a claim to property, provisional possession of it.

Some of the details of the proceedings in a missio in possessionem which are omitted by Gaius may be supplied from Theophilus. Before the final transfer of the debtor's estate by the creditors under the order of the magistrate (addictio) three decrees of the praetor were necessary:—

(1) A decree authorizing the seizure of the debtor's estate and its advertisement for sale (proscriptio). Theophilus gives the form of this advertisement: *ὁ δεῖνα χρεώστης ἡμέτερος ὑπάρχων, εἰς αἰτίαν ἐνέπεσε διαπράσεως. ἡμεῖς, κρεδίτωρες ὄντες, τὴν τούτου διαπιπράσκομεν περιουσίαν. ὠνητὴς ὁ βουλόμενος προσίτω*, 3, 12. 'So-and-so, our debtor, is bankrupt; we, his creditors, are about to sell his estate; whoever wishes to purchase is invited to attend.' This advertisement was affixed to the Columna Maenia, which was in the forum on the Puteal near the Carcer. Pliny, N. H. 7, 60. In the old system of manus injectio, the judgment debtor (judicatus), after the expiration of the thirty dies justi, was no longer allowed to defend an action in person, but might, as we see by the above-quoted fragment of the Twelve Tables, be defended by a vindex. In the formulary system, the equivalent of the vindex was satisdatio judicatum solvi, security with two sureties for the payment of the judgment to be recovered, and the judgment recoverable in an actio judicati was for twice the amount of the disputed judgment debt, 4 §§ 9, 102. Supposing, however, the missio in possessionem was not founded on a previous judgment, but on the debtor's absconding or keeping house, then the period at which he was disabled from defending an action, unless he gave security (judicatum solvi), was the expiration of thirty days after his estate had been seized and advertised for sale, Cicero, Pro Flacco. Before the thirty days have expired, the debtor is admitted to defensio without satisdatio judicatum solvi.

(2) After the possession and proscription of the estate the bankrupt is infamis, and cannot defend without satisdatio judicatum solvi; and a second decree of the praetor empowered the creditors to hold a meeting and elect a magister to manage the sale, corresponding in this respect to the creditor's assignee, or, at the present day, the creditor's trustee of English law.

(3) After a certain period (ten or five days), a third decree authorized the publication of the conditions of sale, which were appended to the original advertisement.

A period of forty or twenty days having thus been completed from the first missio in possessionem, the sale took place by public auction, the universitas juris of the debtor being transferred to the bidder who offered the creditors the highest dividend, that is, the greatest amount in the pound on their respective claims. As we see by the text, § 80, the purchaser became bonitary, not quiritary, owner of the insolvent's property, and he could only sue or be sued by actiones ficticiae or utiles, not by actiones directae, 4 § 35.

The principal acts or defaults, which entitled a Roman creditor to bonorum venditio, may be compared with those which entitle an English creditor to petition for an adjudication in bankruptcy, i.e. to the so-called acts of bankruptcy of English jurisprudence.

(1) As manus injectio might be founded on a previous judgment or an admission of debt (res judicata or aes confessum), and missio in possessionem might be granted against judicatus who makes default, so in English law non-payment of an admitted or a judgment debt after service of a debtor's summons is an act of bankruptcy, and instead of suing out a writ of execution the creditor may petition for adjudication of bankruptcy.

(2) When there is no previous judgment or admission of debt, a debtor who absconds or secretes himself, with intent to defraud his creditors, commits an act of bankruptcy in both systems of law. In English law, for instance, if a debtor makes an appointment with a creditor to meet at the debtor's place of business, and avoids the meeting with the intention of delaying the creditor; or if he withdraws from his usual counting-house to a room upstairs, to avoid the rightful and personal solicitation of his creditors for payment, he commits an act of bankruptcy. So in Roman law: Praetor ait: In bona ejus qui judicio sistendi causâ fidejussorem dedit, si neque potestatem sui faciet neque defendetur, iri jubebo, Dig. 42, 4, 2. 'The praetor says in the edict: If a man enter into a bond with suretyship to appear at a trial, and neither appears in person nor by procurator, I will permit the plaintiff to seize his goods.' Again: Praetor ait: Qui fraudationis causâ latitabit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo, Dig. 42, 7, 1. 'The praetor says in the edict: If a man secrete himself with intent to defraud his creditors, and is not defended by a procurator who gives security approved by an arbitrator, I will order his property to be seized and sold.' Cf. § 78.

There is no adjudication of bankruptcy against a deceased debtor in English law, but there may be a liquidation of his property as in Roman law; there are special rules for the administration of property in such cases, creditors, in default of other administrators, being entitled to take out letters of administration against the estate

of a deceased debtor. As the Roman heir was personally liable for the debts of the deceased, he might by succeeding to an insolvent inheritance become himself insolvent, which is of course not possible in succession by English law.

Cessio bonorum was introduced by a lex Julia, § 78, enacted either by Julius or Augustus Caesar, and if by the latter, in imitation of a measure of the former which he himself has recorded. In the year 48 B. C. when Caesar was consul, credit having collapsed in consequence of the civil war, debtors being generally insolvent, and money having disappeared, Caesar allowed them to discharge their obligations by the transfer of their estates, movable and immovable, to their creditors, at the value, appraised by arbitrators, which they would have borne before the commencement of the war, De Bello Civili, 3, 1. Cessio bonorum conferred three benefits on the debtor: exemption from arrest and imprisonment, exemption from infamy, exemption of his after-acquired property from liability beyond a certain amount.

After the abolition of the legis actiones and the introduction of execution against the estate, execution against the body of the debtor still remained as one of the remedies of the civil code. The insolvent debtor was incarcerated and compelled to labour for the benefit of the creditor, although he could no longer be sold as a slave. From this personal execution a debtor was exempted by cessio bonorum. In eo tantummodo hoc beneficium eis prodest ne judicati detrahantur in carcerem, Cod. 7, 71, 1. 'The principal benefit of bonorum cessio is, that it exempts the insolvent from incarceration.'

From loss of existimatio the insolvent was exempted by bonorum cessio. Debitores qui bonis cesserint licet ex ea causa bona eorum venierint, infames non fiunt, Cod. 2, 12, 11. 'The surrender of a debtor's estate, though followed by a sale of all his property, does not involve infamy.'

Proceedings in bankruptcy or insolvency, in modern days, may be looked upon in two lights: either as a mode of execution, that is, as assisting the creditors to recover as much as may be of their rightful claims, or as a mode of liberation, that is, as a relief of an unfortunate debtor, releasing him of his debts without payment, and enabling him to 'begin the world again' without the overwhelming pressure of his past obligations. By the present English law, with the approval of the Court, a bankrupt may be discharged of his obligations by payment of a dividend of ten shillings in the pound, or, failing this, by a resolution of his creditors that his bankruptcy has arisen from circumstances for which he cannot justly be held responsible, and an expression of their desire that he should receive an order of discharge. Roman law only admitted any limi-

tation of the debtor's liability in very exceptional cases, e.g. in the case of a slave instituted heres necessarius, 2 § 155, in order to save the credit of an insolvent testator. After once becoming heir to the insolvent inheritance, whether he wished it or not, such a person was not liable to further molestation. (Cf. the restriction of liability allowed to an heir by the beneficium inventarii of Justinian.) But the after-acquired property of other insolvents remained liable to successive sales until plenary satisfaction of their debts had been made. Accordingly, bankruptcy is not enumerated, § 168, as one of the modes of extinguishing obligation.

To encourage the bankrupt, however, to make a bonorum cessio, in order that as much as possible might be saved from the wreck of his fortunes for the benefit of his creditors, bonorum cessio not only discharged him, as we have seen, from personal execution, but discharged from liability such portion of his after-acquired property as was necessary for his subsistence. Qui bonis cesserint nisi solidum creditor receperit non sunt liberati, Cod. 7, 71, 1. Is qui bonis cesserit, si quid postea acquisierit, in quantum facere potest convenitur, Dig. 42, 3, 4. See 4 § 43, comm.

The property of a debtor who made a voluntary assignment was sold by the creditors in the same way as when it was taken compulsorily.

Bonorum sectio differed from bonorum venditio in that it vested quiritary, and not merely bonitary, property in the purchaser. Some criminal condemnations involved confiscation, and the sale of the criminal's estate (also of booty taken in war) in this way was conducted not by a magister but by a quaestor of the treasury, who sold under the spear, the symbol of quiritary dominion. Sectio bonorum transferred the juris universitas of the criminal. It is alluded to, § 154, 4 § 146. Bonorum cessio, as we are expressly informed, Cod. 7, 71, 4, only gave the creditors a power of sale (bonorum venditio) and did not invest them with any right of ownership.

In the last period of Roman law, such as we find in the time of Justinian, venditio bonorum was superseded by distractio bonorum, which involved no transfer of the juris universitas. A curator was appointed by the praetor, and instead of selling the active and passive universality of the insolvent's estate to a purchaser who became liable to the insolvent's creditors, merely sold the active residue of his estate in detail. Justinian attributes this change to the abolition of the formulary procedure and generalization of cognitio extraordinaria: Theophilus, to the abolition of the conventus, assizes, sessions, or brief law terms of the provinces, and the erection of permanent provincial tribunals. The continuance of venditio bonorum would have been incompatible with these changes, because they depended on the principle that the entire administration of

civil procedure should be in the hands of imperial officials. It was indeed by the extraordinaria and not by the ordinaria cognitio of the praetor that levying execution by pignoris capio was first instituted.

Under the empire ordinary execution (Pignoris capio) was differentiated from bankruptcy proceedings (Missio in bona). In Pignoris capio the court (not the creditor) was put in possession, and the sale took place in two months, unless the debtor paid before that period. In real actions the res was delivered by the court to the plaintiff; i. e. the court had acquired a new faculty of transmuting property from the defendant to the plaintiff. Only fiscal debtors and insolvents were now subject to loss of freedom, and this was no longer incarceration, but only custodia militaris, surveillance by a soldier. Pignoris capio (special Real exception) was followed by a sale by auction (licitatio, subhastatio) conducted by apparitores Praetoris. Whereas under the early law creditors obtained Missio in bona before proof, and had subsequently to prove their claims against the universal successor (bonorum emptor); under the latest law only those creditors who had proved obtained Missio in bona, and then received their percentage not from the universal successor but at the hands of the judex, immediately from the Massa, the proceeds of the sales by a curator; privileged creditors receiving first their whole claims, unprivileged equal percentages (aequalis portio pro rata debiti quantitate). Two years were allowed to creditors in the same province, four years to creditors in different provinces to prove their claims; after which they retained their claims against the debtor, but not against the possessing creditors. Bethmann-Hollweg, §§ 158-160.

The following observations may serve to supplement the brief remarks of Gaius on the subject of Insolvency:

Bankruptcy proceedings are a form of execution, and therefore belong, not to substantive law, but to the law of Procedure. This branch of law, however, as we have already noticed, has some elements which are not purely formal, but material, and as such are rightly admitted to a treatise on substantive law. Insolvency is placed by Gaius in this part of his treatise, because in his day insolvency occasioned a transfer of a universitas, which was a succession to an entire property.

Proceedings in Insolvency may be divided into two portions, of which one is (A) preparatory, and the other (B) final.

(A) The preparatory portion includes the Proof of their debts by the several creditors; the collection of the assets or formation of the Massa; and its sale. The collection of the assets includes, on the one hand, the recovery back of property that has been aliened in fraudem creditorum; and, on the other, the elimination or separa-

tion from the mass of such things found in the possession of the insolvent as were not really his property but the property of other persons called Separatists.

Separatist claimants are those claimants

(1) Who can sue for a thing by any form of Real action, whether a rei vindicatio, or actio Publiciana (rei vindicatio utilis), or hereditatis petitio, or actio confessoria brought to recover some Personal servitude like usus fructus. An actio in rem confessoria to enforce a Real servitude is obviously not an interest of a nature to give a right of Separation. Those who had a pignus or hypotheca were also ranked by the Romans among the Separatists: in modern law they take their place among the creditors proper or concurrent, who have priority.

(2) Or Separatists are claimants who have a Personal action whereby they can have a claim against the insolvent in respect of some specific thing in his hands; such as actio commodati, depositi, locati, mandati, condictio furtiva, interdictum unde vi, actio de pauperie, or actio quod metus causa.

(B) The final stage is the distribution of the realized proceeds of the present assets among the concurrent creditors according to their classification. The execution does not effect a discharge of the insolvent, and therefore subsequent assets will be subject to a subsequent distribution.

In modern Roman law creditors have been sometimes marshalled in five classes. (For Roman law itself on this subject, cf. Roby, 2, pp. 436, 437.)

1. Creditors with an Absolute privilege, viz. creditors for the funeral expenses of the insolvent. Modern law adds Servants who are creditors for their wages, and the Fiscus which has a claim for arrears.

2. Privileged Hypothecary creditors, i. e. the Fiscus, the wife for her dower, and any creditor who lent money for the purchase or conservation of the subject of hypothecation, e. g. to buy the land or build the house, or build, or buy, or equip the ship, that is hypothecated.

3. Simple hypothecary creditors, who have priority according to the date of their mortgage.

4. Privileged chirographary (merely personal) creditors, or creditors unprotected by mortgage. Privileged are creditors who lent money for the repair of a house; for the purchase, construction, or equipment of a ship; or depositors of money, without interest, in the hands of the insolvent as banker (argentarius, mensularius).

5. Unprivileged personal creditors, Savigny, § 374; Vangerow, § 593; cf. Windscheid, Pandekten, 2 § 271; Dernburg, Pandekten, 3 § 56.

§ 82. Sunt autem etiam alterius generis successiones, quae neque lege XII tabularum neque praetoris edicto, sed eo iure ⟨*quod*⟩ conse*n*su receptum est introductae sunt. Inst. 3, 10.

§ 82. There are other kinds of universal succession not governed by the law of the Twelve Tables nor by the praetor's edict, but by rules of consuetudinary law.

§ 83. Eteni*m* cum pater familias se in adoptionem de*dit* mulier*ue* in manum conuenit, omnes eius res incorporales et corporales quaeque ei debitae sunt, patri adoptiuo coemptionatoriue adquiruntur, exceptis his quae per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio *libertinorum* quae per iusiurandum contracta est, et *lites contestatae* legitimo iudicio. Inst. l. c.

§ 83. When a paterfamilias gives himself in adoption, or a woman subjects herself to hand, all their property, incorporeal and corporeal, and all debts due to them, are acquired by the adoptive father and the fictitious purchaser, excepting such rights as are extinguished by loss of status — usufruct, for instance, bounden services of freedmen secured by oath, and claims in respect of which there has been joinder of issue in a statutory trial.

§ 84. Ex diuerso quod is debu*it*, *qui se in* adoptionem dedit quae*ue* in manu*m* conue*nit*, *non* transit ad coemptionatorem aut ad patrem adoptiuum, *nisi si* hereditarium aes alienum f*uerit*. *tunc* enim quia ipse pater adoptiuus aut coemptionator heres fit, directo tenetur iure; i*s uero*, *qui* se adoptandum dedit quae*ue* in manum conuenit, desinit esse here*s*. de eo uero quod proprio nomine ea*e* personae debuerint, licet neque pater adoptiuus teneatur neque coemptionator, *et ne* ipse quidem, qui se *in ad*optionem ded*it quaeue* in manum conuenit, maneat obligatus obligata*ue*, quia sc*ilicet* per capitis deminutionem liberetur, tamen in eum eamue utilis actio datur rescissa capitis deminutione; et si aduersus hanc actionem non defenda*n*tur, quae bona eorum futura fuissent, si se alieno iuri non

§ 84. Conversely, the debts of the person who gives himself in adoption or of the woman who becomes subjected to hand (manus), do not pass to the fictitious purchaser (coemptionator) or adoptive father, unless they are hereditary debts, for in this case as the adoptive father or coemptionator are heredes instead of the persons made subject to them, they become directly liable, while the person adopted and woman sold into subjection are released from liability by ceasing to be heredes; but if the debt was owed in their own name, their adoptive father or fictitious purchaser incurs no liability, nor do the person adopted and woman subject to hand remain even themselves liable at civil law, their liability being extinguished by their capitis deminutio: a praetorian action, however, based on a feigned rescission of their capitis deminutio (4 § 38), is granted to the creditors against them, and if the action is not defended the property

subieeissent, uniuersa uendere creditoribus praetor permittit. Inst. l. c.

which would have belonged to them but for their capitis deminutio is allowed by the praetor to be all sold by the creditors.

§ 84. See 1 §§ 97–107, comm., 1 §§ 159–164. By arrogation a man passed from the status of paterfamilias to that of filiusfamilias, from domestic independence to domestic dependence. Thus it operated, a capitis minutio minima. Capitis minutio minima had various effects on a man's rights and obligations:—

(*a*) As it implied a change of family, it entailed a loss of rights founded on agnation, including the sworn services of a freedman, for the patron was treated in certain circumstances as a quasi agnate.

(*b*) It had further effects, which perhaps we must be contented at the present day to regard as merely positive and inexplicable. Thus it extinguished any ususfructus or usus vested in the arrogatus. This effect was abrogated by Justinian, Cod. 3, 33, 16.

(*c*) It extinguished debts owed by the arrogatus. As a filiusfamilias was just as capable at civil law of incurring debts as a paterfamilias (apart from the change in the law made by S. C. Macedonianum), it is hard to say why the passage from one condition to the other should operate an extinction of debt. Ihering suggests that when the lex curiata required in Adrogatio was a reality, it was not enacted until all proved debts of Adrogatus were discharged; and that the publicity of the proceeding made uninjurious to the creditors what the protection of Adrogator required—the ipso facto extinction of all debts not proved before the enactment of the law. But when the people were merely represented by thirty lictors, and Adrogatio became comparatively a private proceeding, the old rule had ceased to be just, and was practically abolished by the Praetor's Restitutio in integrum.

Adrogatio in the legislation of Justinian only conveyed to the adrogator a usufruct in the property of the adrogatus. The ownership subject to the usufruct (proprietas) remained in the adrogatus, Inst. 3, 10, 2; but the rights of the creditors of adrogatus were not allowed to be injured by this change, Inst. 3, 10, 3.

Coemptio is not noticed by Justinian, as the in manum conventio of the wife was obsolete long before his time.

§ 85. *Item si* legitimam *hereditatem heres, antequam cer*|nat aut pro herede gerat, alii in iure cedat, pleno iure fit ille heres, cui cessa est hereditas, *proinde ac si ipse per* legem ad hereditatem uocaretur. quodsi

§ 85. If a person who is entitled to succeed as agnate to an intestate, before declaring his formal acceptance or informally acting as heir, surrender the inheritance by in jure cessio, the inheritance (hereditas) passes to the sur-

posteaquam heres extiterit, cesserit, adhuc heres manet et ob *id* creditoribus ipse tenebitur; sed res corporales transferet proinde ac si singulas in iure cessisset, debita uero pereunt, eoque modo debitores hereditarii lucrum faciunt.

renderee exactly as if he were called to it by the law of the Twelve Tables itself. But if the agnate first accepts and then surrenders, he nevertheless continues to be heir, and remains liable to the creditors for the debts of the deceased: in this case the corporeal objects of the inheritance pass to the surrenderee just as if they had been separately surrendered (res singulae), but the debts of the inheritance are thereby extinguished, the debtors gaining the advantage of being discharged of liability.

§ 86. Idem iuris est, si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem; ante aditam uero hereditatem cedendo nihil agit.

§ 86. The same happens when an heir instituted in a will accepts and then surrenders, but before acceptance his surrender is inoperative.

§ 87. S*u*us autem et necessarius heres an aliquid aga*n*t in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant; diuersae scholae auctores idem eos agere putant, quod ceteri post adi*t*am hereditatem; nihil enim interest, utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur.

§ 87. Whether a self- and necessary successor passes the succession by such a surrender is a question. According to my school the surrender is in this case inoperative: the other school think that the effect is the same as when the voluntary heirs surrender after acceptance, and that it makes no difference whether a man is heir by legal necessity on the one hand or by formal acceptance or informal acts of heirship on the other.

§ 85. Gaius now proceeds to another mode of conveying a juris universitas, the conveyance by an agnate of a delated but not accepted inheritance. Cf. 2 §§ 34, 35. We must bear in mind the distinction between heres and vocatus ad hereditatem, the offer (delatio) of an inheritance by the law or by a testator, and its final acquisition (aditio, acquisitio) by the delatee (2 §§ 152, 153, 162). In the case of the heres necessarius, the self-successor and the testator's manumitted slave, delatio and acquisitio coincide; but in the case of the voluntarius heres, the agnate or the extraneus scriptus, they are two distinct events. An explanation of the causes of the different effects of an in jure cessio by these different classes might have thrown some light on this branch of early Roman law, but the

reasons are not given by Gaius, and perhaps we must now be content to regard these distinctions as merely positive and inexplicable rules. Perhaps, as Ihering suggests, it was held, that to permit an heir appointed by will to part with the inheritance—in other words, to convert it into money—would have been in direct opposition to the testator's intention; who, if he approved of such a step, might have adopted the mode of testation explained in 2 § 189, comm., i.e. might have instituted not the beneficiary but his slave.

Successio per universitatem, as already mentioned, was an institution only recognized by the legislator in a limited number of cases: one individual could not make another as he chose, in pursuance of private disposition, his universal successor. In respect of the voluntary transfer, inter vivos, of an inheritance, universal succession was only admitted in two cases: transfer by an agnate of delata hereditas (of his right to acquire an intestate succession) in the interval between delatio and aditio, and transfer (restitutio) by an heir to a fideicommissaria hereditas under the Sc. Trebellianum, 2 §§ 246, 259, comm.

The sale of an inheritance after acceptance was carried out in later law not by in jure cessio, but informally by emptio venditio accompanied with tradition and stipulations or cession of actions respecting the debts to or from the inheritance, 2 § 252; cf. Roby, 2, p. 162.

§ 88. *Nunc transeamus* ad obligationes. quarum summa diuisio in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto. Inst. 3, 13; Gaius in Dig. 44, 7, 1, 1.

§ 88. We proceed to treat of obligations, which fall into two principal classes, obligations created by contract and obligations created by delict.

§ 89. Et prius uideamus de his quae ex contractu nascuntur. harum autem quattuor genera sunt: aut enim re *con*trahitur obligatio aut uerbis aut litteris aut consensu. Inst. l. c.

§ 89. We first treat of those which we founded on contract, which are of four orders, for contract is concluded by delivery of a thing, by words, by writing, or by consent.

Having examined Unequal primary real rights (status) and a portion of Equal primary real rights, namely, ownership and servitudes (jura in re), and omitting the detailed examination of another portion of Equal primary real rights, namely, Primordial rights, we quit the subject of real rights, or rights to forbearances binding indifferently all the world, and proceed to Obligations, jura in personam; that is to say, rights to certain acts or forbearances binding exclusively certain individuals.

The law of contract differs from other branches of law in that its function is rather auxiliary to human freedom than restrictive or coercive. While the law of Status and the law of Ownership are imperious and peremptory and felt by the fetters they impose on human volition, the law of Contract is ministerial to manifestations of will, and fosters and protects the most diversified activity and enterprise. The law of Contract is the most plastic part of the code and the part most susceptible of adaptation to the necessities of commerce: it is the portion of Roman jurisprudence which has survived with least alteration in modern Europe; and of all departments of modern codes it is the portion whose relative importance is already the greatest and is continually increasing.

But though to contract is a matter of free choice, Obligation, to be a subject of jurisprudence, implies compulsion: Debitor intelligitur is a quo invito pecunia exigi potest, Dig. 50, 16, 108. 'Debtor denotes a person from whom money may be extorted against his will:' i.e. it excludes merely moral duties (officia) because the state applies no coercion to enforce their performance.

Obligation, in the narrower sense in which we proceed to use the term, also excludes those duties which the legislator imposes on all the world alike towards a person invested with a Real right, whether a Primordial right, a right of Status, or a right of Dominion. Duties correlative to jus in rem, which are invariably negative in character, have scarcely received a distinctive appellation in the Latin language: for the sake of distinction from moral duties they may be called Necessitas, and for the sake of distinction from Positive duties, Necessitas abstinendi.

Justinian defines Obligation as follows: Obligatio est juris vinculum quo necessitate astringimur alicujus solvendae rei secundum nostrae civitatis jura, Inst. 3, 13. 'Obligation is a legal bond, by which we are compelled to some performance (solutio) in accordance with the law of the state.'

The performance (solutio) which it is the object of the law to enforce when it imposes an obligation is sometimes decomposed into three elements, expressed by three terms, dare, facere, praestare. In personam actio est quotiens cum aliquo agimus qui nobis ex contractu vel ex delicto obligatus est, id est, cum intendimus dare, facere, praestare oportere, 4 § 2. 'A personal action pursues an obligation arising from contract or delict, and declares that the defendant is bound to convey, perform, or make some render for a wrong.' Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum, Dig. 44, 7, 3, pr. 'An obligation has not the effect of making a person

owner of a corporeal thing or of giving him a right of servitude, but its object is to compel him to convey the ownership of something, or to oblige him to render some service, or make some other restitution. Dare denotes the transfer of ownership in a certain thing or sum of money: Facere, the render of any service other than the transfer of ownership in a certain thing: and Praestare may possibly signify the discharge of any obligation engendered by maleficium.

However diversified may be the Object of an obligation, it is always transformable, in the eye of the law, into the payment of a certain sum of money. Ea enim in obligatione consistere quae pecunia lui praestarique possunt, Dig. 40, 7, 9, 2. 'Obligation can only have for its Object something redeemable and replaceable by money.' Hence if it is desired to bind to the performance of some act not in its nature susceptible of pecuniary appreciation, it is necessary to make the direct Object of stipulation the payment of a certain penal sum, stipulatio poenae nomine, and the non-performance of the act desired the title or condition whereupon the penal sum shall be forfeited, as by a bond in English law; for then the obligation, having a pecuniary value, is a civil obligation enforceable by the tribunals. The performance of the act desired is thus practically enforced, although nominally it is removed from the position of Object of the stipulation to that of Condition.

In speaking of the right of Dominium or Ownership, we have already noticed (2 § 1, comm.) that besides the primary OBJECT of the right (abstention from molestation), there is always a secondary object, land, house, slave, or the like, to which such molestation relates. So, in view of this transformability of all Objects of obligation into money payments, we may say that the ultimate OBJECT of every obligation is an Alienation, or transfer of property; and is always a certain amount of Pecuniary value.

The primary and most comprehensive division of Obligatio is one that has already been noticed, 1 § 1, into (A) CIVILIS obligatio, and (B) NATURALIS obligatio.

(A) CIVILIS obligatio is obligation enforceable by action, whether it derives its origin from Jus civile, as the obligation engendered by formal contracts or the obligation enforceable by penalty in a delictal action, or from that portion of Roman law which belonged to Jus gentium; such as the obligation engendered by Formless contracts, and obligation to indemnify engendered by delict.

(B) Obligatio NATURALIS is obligation not immediately enforceable by action, or obligation imposed by that portion of Jus gentium which is only imperfectly recognized by law; obligation, however, which is recognized by positive law in various operations, e.g. as founding a defence called Exceptio, i.e. a contention that the right

of the plaintiff, though not nullified, is counteracted by an opposing right of the defendant, 4 §§ 115–137, comm.; as giving a right of Retention (barring condictio indebiti soluti) and of being used as a good set-off against the claim of the plaintiff (compensatio), 4 § 61; and as capable of forming a basis of various Accessory institutes of Civil law, such as Novatio, Pignus, Fidejussio, Constitutum.

Naturalis obligatio, with its partial and occasional protection, may seem a singular and anomalous institute of Roman law, but it is paralleled by the recognition, though to a very minor extent, of Imperfect obligations in English jurisprudence. Imperfect obligations are so called, not because they are less binding in the forum of conscience than those which are perfect, but because they are not directly enforced by political sanctions, because various motives induce the state to exempt the debtor from positive coercion. Instances of imperfect obligation are debts barred by a statute of limitations, and debts discharged by adjudication of bankruptcy. A written promise to pay by the bankrupt or debtor discharged by limitation, perfects and revives the imperfect obligation, and makes it ground to support an action. As in English law a merely moral duty is an inadequate consideration to support and validate a promise to pay, the validity of such ratificatory promises shows conclusively that the obligation of the insolvent, and of the debtor discharged by limitation, is regarded in English jurisprudence as something more than a moral obligation, as, to a certain extent, a legal obligation; that is, is viewed by English tribunals in the light in which naturalis obligatio was viewed by Roman tribunals. Cf. Anson on Contract, p. 116, 10th ed.

Civil obligations fall under two principal classes: (1) those to which the title or investitive fact is a CONTRACT; and (2) those to which the title or investitive fact is a DELICT. In obligation created by CONTRACT there are two stages: there is first a primary or sanctioned Personal right antecedent to wrong, and afterwards a secondary or sanctioning Personal right consequent on a wrong. In obligation founded on DELICT there is the second stage, a secondary or sanctioning Personal right consequent on a wrong, but the first stage is not a Personal right (jus in personam), but a Real right (jus in rem), whether a Primordial right, right of Status, or of Property.

These two typical classes, however, fail to comprehend all the obligations enforceable by action, and two supplementary classes have to be added: (3) obligations similar to those founded on contract (obligationes quasi ex contractu); and (4) obligations similar to those founded on delict (obligationes quasi ex delicto). It will be noticed

that Gaius does not give this fourfold classification of the sources of obligation, which is found in the Institutes of Justinian, but derives all obligations either from Contract or Delict. In a passage of the Digest (44, 7, 1, pr.) excerpted from a work of Gaius, those not arising in the two principal ways are put in one miscellaneous group, 'obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam jure ex variis causarum figuris.'

A Contract is a convention or agreement (conventio, pactio, pactum) enforceable by appeal to a court of law. Et est pactio duorum pluriumve in idem placitum et consensus, Dig. 2, 14, 1, 2. 'A pact exists when two or more persons come to an identical resolution, and agreement on a particular subject.'

Consensus, the essence of contract, will be found on close examination to consist not, as might at first sight appear, of two precisely similar elements contributed by the two consenting parties, but of two dissimilar elements, an intention signified by a promisor, and a corresponding expectation signified by a promisee. The promisor promises that he will do or perform some given act or acts, or that he will forbear or abstain from some given act or acts; that is, he signifies to the promisee that he intends to do the acts or to observe the forbearances which form the object of his promise: and the promisee accepts the promise; that is, signifies to the promisor his belief or expectation that the latter will do or forbear agreeably to the intention which he has expressed. Every agreement, then, consists of a promise proffered and accepted or of reciprocal promises proffered and accepted by each party; that is, (1) of a signification by the promising party of his intention to do the acts or to observe the forbearances which he promises to do or observe, and (2) a signification by the promisee that he expects that the promising party will fulfil the proffered promise. Without signification of the intention there is no promise; without signification of the expectation there is no reason for enforcing the promise. The consensus of the parties is the chiming or going together of this intention with this expectation; their direction to a common object, the acts or forbearances contemplated by the convention. Pollicitation is the offer of the one party before it is accepted by the other. Pactum est duorum consensus atque conventio; pollicitatio vero offerentis solius promissum, Dig. 50, 12, 3, pr.

A leading division of contracts or agreements enforceable by action is into FORMAL contracts and FORMLESS contracts. Formal contracts are Nexum (in early law), Verbal contract or Stipulatio, and Literal contract or Expensilatio. Formless contracts are Real (Mutuum, Commodatum, Depositum, Pignus), Innominate contract (do ut des, &c.), or Consensual (Emptio, Locatio, Societas,

Mandatum). Formal contracts derive their validity from the observance of a form prescribed by positive law, and calculated to inspire by its solemnity serious reflection in the negotiators, and to distinguish definitive resolution from preparatory negotiation and debate. In Real contract the earnestness and definitiveness of the resolution is proved by one contractor parting with ownership, as in mutuum or with physical control of the thing, as in commodatum, depositum, pignus. The obligation, too, contracted by the other party is perfectly plain, being in most cases simply restitution. In Exchange (permutatio), an Innominate contract, the duty of the promisor is not quite so simple; it is not restitution, but the transfer of an equivalent; and, accordingly, the validity of the contract of Exchange was not established till a comparatively late period of Roman jurisprudence. The daily and hourly employment of the Consensual contracts of Purchase and Hiring, while it would make the requirement of any formality intolerably inconvenient, also renders the nature of these contracts perfectly familiar to all the world, so that the mere mention of their names awakens as vivid a picture of their consequences as could the observance of the most ceremonious form. In the remaining Consensual contracts, Agency and Partnership, the position of the Agent or Partner who is called to account for property that has passed into his hands or that has been lost by his negligence is so similar to that of a party to a Real contract that there could be no hesitation in extending to these contracts the protection of the public tribunals.

An agreement that was neither valid by its Form, as was the the stipulation, nor was one of the four Consensual contracts with their familiar names, nor was a Real or innominate contract, that is, an agreement where on one side the consideration (causa praeter conventionem, Dig. 2, 14, 7, 4) was executed, nor, though outside the classification of contract, was made valid by the edict or some special statute, was not directly enforceable at law, and was called a Nudum pactum. A Nude pact, though ineffectual to produce civilis obligatio, may produce naturalis obligatio. Igitur nuda pactio obligationem non parit, sed parit exceptionem, Dig. 2, 14, 7, 4. 'A nude pact creates no (civil) obligation, but creates a defence.' Interest on a loan could only be secured by the Formal contract of Stipulatio: but a nude pact to pay interest could be secured by pignus, Dig. 13, 7, 11, 3, and could be pleaded in bar to a suit for recovering back the interest when actually paid (condictio indebiti soluti): and we have seen that exceptio, pignus, solutum non repeti, are some of the criteria which indicate the existence of naturalis obligatio, Dig. 46, 3, 5, 2.

Another important division of contracts is into UNILATERAL and

BILATERAL. Wherever mutual promises are proffered and accepted there are in strictness two or more obligations; but where one of the promises is thus made to depend on the other, the several obligations are cross or implicated, and therefore are commonly deemed to arise from one agreement. Where one only of the agreeing parties gives a promise, the proffered and accepted promise is called a Unilateral agreement; where each gives a promise, and the promise of one is made to depend on the promise of the other, the several proffered and accepted promises are called a Bilateral or Synallagmatic agreement. Under a unilateral agreement only one party can sue or be sued, under a bilateral agreement each party may sue or be sued in turn. The sole Unilateral agreements or contracts mentioned by Gaius are Expensilatio, Stipulatio, Mutuum. Emptio-Venditio, Locatio-Conductio, Societas, are examples of Bilateral agreements. Depositum, Commodatum, Pignus, Mandatum, are called imperfectly Bilateral agreements, because they do not necessarily and originally produce any reciprocal obligation, but only ex postfacto, i.e. in consequence of some circumstance incidental to the agreement, as a claim of depositarius to be indemnified on account of some necessary expense he had been put to in respect of the thing deposited with him. The action founded on the original and principal obligation of a semi-bilateral agreement, i.e. the action of the depositor, lender for use, pawnor, or person giving the mandate, is called judicium directum or actio directa: the action founded on the incidental or ex postfacto obligation, i.e. the action of the depositary, borrower for use, pawnee, agent, is called judicium contrarium or actio contraria. The Unilateral agreements above mentioned, even though, like Mutuum, institutions of Jus gentium, give rise to condictiones or actions of strict law (stricti juris actiones); bilateral and semi-bilateral agreements give rise to equitable actions (bonae fidei actiones).

The classification of contracts by Gaius does not include the Nexum, which seems to have been a form of contracting in early law. No precise information concerning its characteristics have come down to us, and hence modern writers frequently differ in their explanation of it. (See Muirhead's Roman Law, p. 151; Roby, Roman Private Law, Bk. V. App. B; Sohm, pp. 52, 392.) Nexum is sometimes used in a general sense to include all proceedings carried out per aes et libram, while it is elsewhere distinguished from mancipation. Nexum Manilius scribit omne quod per libram et aes geritur, in quo sint mancipia. Mucius quae per aes et libram fiant ut obligentur, praeterquam mancipio detur. Hoc verius esse ipsum verbum ostendit, de quo quaeritur; nam id est, quod obligatur per libram neque suum fit, inde nexum dictum. Varro, L. L. 7, 105. —Nexum est, ut ait Gallus Aelius, quodcumque per aes et libram

geritur, id quod necti dicitur, quo in genere sunt haec, testamenti factio, nexi datio, nexi liberatio, Festus.

The nexi liberatio seems to be referred to by Gaius, § 173. Est autem alia species imaginariae solutionis per aes et libram. Quod et ipsum genus certis in causis receptum est; veluti si quid eo nomine debeat quod per aes et libram gestum sit sive quid ex judicati causa debeat. Nexum and mancipium are clearly distinguished in the following well-known citation of Festus from the Twelve Tables—cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.

From these and other passages we may gather that Nexum in a specific sense was, according to the law of the Twelve Tables, a form of obligation entered into per aes et libram.

As a form giving rise to an obligation Nexum was apparently a contract for a money loan (certa pecunia credita); not a fictitious money loan, as has sometimes been supposed, but a real one, just as mancipium was originally not a fictitious, but a real sale. Debtors who bound themselves to their creditors in this solemn way were the nexi, whose harsh treatment in early times is dwelt on by Livy; if they made default on the day of payment, they were immediately treated as judgment debtors, being without further process liable to manus injectio; i. e. to be seized by the creditor and taken into court in order that the praetor might award personal execution; in other words, deliver him as a quasi-slave to the creditor (addicere, duci jubere).

Nexum as a solemn form of contracting a loan was abolished, or at least deprived of its sanction, by the lex Poetelia, Livy, 8, 28: as a form of extinction of obligation in certain cases, Nexum continued to exist in the time of Gaius, § 173.

In the Twelve Tables the law of contract is still in a rudimentary stage. The formal obligation of Nexum is confined to money loans. Stipulation belongs to later law. No informal contract is recognized. Such contracts, as deposit, loan for use and pledge, could only be made, if at all, by the tortuous process of mancipatio cum fiducia.

The arrangement adopted by Gaius is not without significance. He begins with a Real, that is, a Formless contract, found in jus gentium; and from these Real contracts he selects Mutuum, the contract which took the place of the old formal contract of Nexum, the source of Roman contract law. He then proceeds to Formal contracts, Verbal and Literal, which appear to have been subsequent to the Twelve Tables; and concludes with the remaining and comparatively modern class of Formless contracts, namely the Consensual.

§ 90. Re contrahitur obligatio uelut mutui datione. ⟨*mutui autem datio*⟩ proprie in his [fere] rebus contingit qua*e* pondere numero mensura constа*nt*, qualis est pecunia numerata uinum oleum frumentum aes argentum aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non ea*e*dem, sed alia*e* eiusdem naturae reddantur. unde etiam mutuum appellatum est, quia quod ita *ti*bi a me datum est, ex meo t*u*um *fi*t.

Inst. 3, 14, pr.; Gaius in Dig. 44, 7, 1, 2.

§ 90. Of real contracts, or contracts created by delivery of a thing, we have an example in loan for consumption, or loan whereby ownership of the thing lent is transferred. This relates to things which are estimated by weight, number, or measure, such as money, wine, oil, corn, bronze, silver, gold. We transfer ownership of our property in these on condition that the receiver shall transfer back to us at a future time, not the same things, but other things of the same nature: and this contract is called Mutuum, because thereby meum becomes tuum.

§ 91. Is quoque qui non debitum accepit ab eo qui per errorem soluit re obligatur. nam proinde ei condici potest SI PARET EVM DARE OPORTERE, ac si mutuum accepisset. unde quidam putant pupillum aut mulierem, cui sine *tutoris auctoritate* non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. sed haec species obligationis non uidetur ex contractu consistere, quia is qui soluendi animo dat magis distrahere uult negotium quam contrahere. Inst. 3, 14, 1.

§ 91. The receiver of what was not owed from a person who pays in error is also under a real obligation, for he may be sued by Condictio with the formula: 'If it be proved that he ought to convey,' just as if he had received the property in pursuance of a loan. And, accordingly, some have held that a ward or female, if their guardian has not authorized them to receive a payment, are not liable to be sued for money paid in error any more than they are for money received as a loan. This, however, is a mistake, as the obligation in this case seems to be of a kind not arising from contract, as a payment in order to discharge a debt is intended to extinguish an obligation, not to establish one.

§ 90. The thing to be restored by the borrower in a loan for consumption (money being consumed by spending it) was not the specific thing that was borrowed, but some other thing of the same genus. Such members of a genus as are naturally capable of mutual substitution (quae vice mutua funguntur) received from modern civilians the barbarous name of res fungibiles. A more significant barbarism, if any was necessary, would have been res vicariae, from

the principal word of the definition. The classical name was neither res fungibilis, nor res vicaria, but Quantitas, Dig. 44, 2, 7, pr.

§ 91. The auctoritas of the guardian was only wanted to supply the want of capacity in the ward to take care of his own interests. As Condictio indebiti, the action brought for recovering money paid by mistake, was not founded on disposition or contract, but on the fact that a defendant had been without cause enriched at the expense of the plaintiff, there seems to be no reason why it should not be brought against a ward who receives without his guardian's sanction money to which he is not entitled, except that the ward might in the meantime have improvidently spent the money he had received. Justinian decides that the ward is not under the circumstances liable to condictio indebiti, Inst. 3, 14, 1.

The obligation arising by a contract of mutuum is only an obligation to repay the principal of the debt. The loan is regarded as gratuitous ; if any interest is intended to be paid, it requires to be secured by an accompanying verbal contract, or stipulation. The repayment of the principal was enforced by the general personal action of condictio.

Connected with the contract of mutuum was the senatusconsultum Macedonianum, named, according to Theophilus, after a parricide, according to some commentators, after a money-lender. This decree passed, according to Tacitus, under Claudius (Annales, 11, 13), according to Suetonius, under Vespasian (Suet. Vesp. 11), made a loan of money to a son under power (filiusfamilias) without the consent of the father irrecoverable by action though binding naturaliter (naturalis obligatio). Neither the age nor the rank of a filiusfamilias affected his incapacity to contract a pecuniary loan. The disability of the filiusfamilias did not extend to any contract other than a pecuniary loan.

By the English law bargains made with expectant heirs and remaindermen, during the lifetime and without the knowledge of the parent, may be set aside by a court of equity on the ground of unfairness or inadequacy. See Pollock on Contracts, p. 622, 7th ed.

Besides Mutuum there are three other Real contracts, Commodatum, Depositum, Pignus; there are also the Innominate contracts, which resemble the Real, in that they are concluded by an act being executed on one side, such act consisting in their case either in the conveyance of a thing for a promise to convey something else or to perform some service in return, or in the performance of a service for a promise to convey a thing or to render a service in return; where a thing is thus conveyed in the first instance the obligation of the transferee is not in the innominate, as in the real contract, to return the same specific thing or thing of the same kind (genus), but something different. Each of these modes of contracting requires a brief notice.

Commodatum, a loan for use, is the gratuitous lending of an article to be used by the borrower. It must be gratuitous, for, if any compensation is to be paid, the transaction ceases to be a commodatum, and becomes a letting and hiring (locatio conductio). A loan for use differs from a mutuum, or loan for consumption, in that it passes no property to the borrower. Accordingly, in a loan for use the specific thing that was lent is to be returned, whereas in a loan for consumption it is only to be returned in kind. Again, in case of destruction by an inevitable accident, as fire, shipwreck, or invasion, in a mutuum the loss falls on the borrower (genus et quantitas nunquam pereunt), in a commodatum on the lender. The commentators have expressed the owner's risk in such cases by the formula, res perit domino, 'the loss from accidental destruction falls on the owner'; and this proposition holds good of contracts of mutuum and commodatum and most others; but in a consensual contract of sale of a specific thing (emptio venditio), as soon as the obligation is complete, before the property has passed by delivery (traditio) to the buyer, if the thing is destroyed without the fault of the vendor, the loss falls on the buyer (res perit emptori), and he can be compelled to pay the purchase-money, although the object of sale has never been in his possession, Inst. 3, 23, 3. We must not identify the borrower's right to use the thing lent to him (commodata), which is a contractual one, with the personal servitude (jus in re) called Usus, which is created by other methods and governed by different rules. (For the law relating to the liability of commodatarius and on account of negligence, see comm. at the end of this book.)

Depositum is the delivery of a thing for custody, to be redelivered on demand, without compensation. It is properly gratuitous, for if a compensation is to be given it is a contract of hiring and letting, and not a deposit. The ownership remains in the depositor; the depositary has sometimes interdict Possession, as in the case of the Sequester, but as a rule, merely Detention, 4 § 170, comm. The identical thing that was deposited is to be returned, not an equivalent of the same kind or quality, as in mutuum. An involuntary depositor, that is, one under stress of shipwreck, fire, civil commotion, the fall of a house, can sue in penal damages for twice the value of the deposit. Sequestration is the deposit of a subject of litigation by consent of parties or order of the court in the hands of a stakeholder (sequester) to abide the result of the trial. When a depositary is bound to restore not a specific thing (idem) but its equivalent, and by a pactum adjectum pays interest for the privilege of using it in the interim; e. g. when a banker pays interest to his depositors; the contract is called Depositum irregulare, and ownership in the thing

deposited, as well as possession, contrary to the general rule passes to the depositary. Dig. 16, 3, 24. The passages in the Digest relating to this show that Banking in the modern sense of the word, i. e. the payment of a small interest to depositors and receipt of a larger interest from borrowers of the deposit, was practised by Roman Mensularii, Vangerow, § 630.

Pignus, pledge, pawn, or mortgage, is the creation of a real right (jus in re aliena) in a thing, movable or immovable, to be held as a security for a debt, and to be retransferred when the debt is satisfied. But this conception of pignus was only reached by gradual steps.

There are three forms of giving real security to a creditor, corresponding to three eras in the development of Roman law, which must be separately examined.

(1) The earliest is not in the regular form of a pledge, being effected by a mancipatio or in jure cessio of property, accompanied with a fiducia, or fiduciary agreement for reconveyance, cf. 2 § 60. As a form of security, it is analogous in principle to the English common law mortgage, the ownership in the thing pledged being conveyed to the creditor on the understanding that he is to reconvey it when the debt is paid. The security which this gives to the creditor is that he can recover the thing by vindicatio from any possessor of it, and can sell it as he pleases, though he is liable to the debtor in the actio fiduciae, if he exercises his right improperly. This personal action is the only remedy which the debtor has in respect of the property which he has made over as security for his debt, as having parted with the ownership he has no actio in rem for recovery of it from third parties. But in course of time it seems to have become a common practice for the creditor to allow the debtor to keep possession of the pledge, the latter holding it of him by leave and licence (precario) and having interdict possession of it. The unsatisfactory character of this way of securing a creditor, considered from the point of view of the debtor, is obvious. Yet in a tablet found at the mouth of the Guadalquivir, which probably belongs to the first century after Christ, we see that it was still in use not long before the time when Gaius wrote (Bruns, Fontes, ed. 6, no. 110).

(2) Pignus, in the strict sense, was effected simply by delivery of possession without in jure cessio or mancipatio. The debtor continued to be owner of the thing pledged, the creditor or pledgee only acquiring interdict-possession of it. But a condition was sometimes inserted in the agreement, by which it was agreed that the thing given in security should become the property of the creditor in case of default (lex commissoria), though by later law such a condition was made void.

The effect of Pignus was to put the debtor in a much more satisfactory position than in the previous case; but on the other hand the security of the creditor was thereby rendered thus weaker, since he was deprived of his actio in rem to recover the thing from third parties, having only a possessory interdict. Nor apart from special agreement (pactum de vendendo) had he any right of sale.

(3) The law of pledge was established on a satisfactory footing, when the praetor gave the creditor or pledgee the actio quasi-Serviana in rem or hypothecaria, by which he acquired a real right in the thing (jus in re aliena), while the debtor remained owner of it; a right of sale, in case of default, being implied in the transaction. By these changes both the interests of the debtor and creditor were fully regarded. Under this system there was the further advantage, that property of any kind might be given as security to a creditor by Hypothecation, i. e. by mere agreement without delivery of possession. In this case it was simply the creation of a jus in re, imposing no Obligation on the creditor thus secured. If, however, a pignus was created by delivery of the thing pledged, the legal position of the pledgee would be of a twofold kind: (1) he would have a jus in re aliena, which he could enforce by actio quasi-Serviana in rem; (2) there would be a contractual relation between him and the debtor, they being bound to one another by the real contract of pignus, which was enforced by the actio pigneraticia directa and contraria in personam.

The action of the creditor to recover the thing pledged, called quasi-Serviana, hypothecaria, or pigneraticia, was as we have seen a real action (in rem). It was originally, as actio Serviana, only given to a farmer (colonus), whose invecta et illata were hypothecated to his landlord for rent. It was probably an actio arbitraria with a formula in factum concepta (these terms will be explained in 4 § 47, comm.) to something like the following effect: Si paret inter Aulum Agerium et L. Titium convenisse, ut ea res, qua de agitur, Aulo Agerio pignori hypothecaeve esset propter pecuniam debitam, eamque rem tunc cum conveniebat, in bonis L. Titii fuisse eamque pecuniam neque solutam neque eo nomine satisfactum esse, neque per Aulum Agerium stare quo minus solvatur, nisi ea res arbitratu tuo restituetur, quanti ea res erit, tantam pecuniam judex Numerium Negerium Aulo Agerio condemna, &c., Lenel, § 267.

Besides this actio Hypothecaria, whereby the rights of the mortgagee were definitively decided, there was an Interdictum Salvianum, 4 § 147, to enable the landlord to recover the goods of the farmer pledged to him for his rent. It is most probable that this remedy was not like the actio Serviana, which was of later origin, maintainable against third parties in possession of the goods. Its formula was probably something like the following: 'If such

and such a slave is one of the things respecting which you agreed with the plaintiff that whatever was inducted, illated, imported into such and such land, or was thereon born or produced, should be pledged to the plaintiff to secure the payment of the rent of such land; in that case I prohibit your employment of force to hinder the plaintiff from abducting the slave.' Thus the relation of actio Hypothecaria to interdictum Salvianum would resemble that of Vindicatio to the interdict Utrubi or Uti possidetis, 4 § 148, or that of Hereditatis petitio to the interdict Quorum bonorum, 4 § 144.

Innominate or unnamed contract is an agreement not falling under any of the classes of named contract, which becomes binding by execution on the part of one of the contractors. Such contracts, which are of a miscellaneous character, are similar to the real in the principle of their formation, but differ from them in the ways we have previously pointed out. Bilateral conventions, Real or Consensual, fall into four classes: Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias, Dig. 19, 5, 5, pr. 'There may be a transfer of property to you on my part in consideration of your having to transfer property to me in exchange, or transfer of property on my part in consideration of your having to make some other kind of performance to me, or some other act of performance in consideration of your having to transfer something to me, or performance of some other kind than transfer in consideration of your having to make performance of some such other kind in exchange.' Some agreements, before execution on either side, would give rise to Named consensual contracts, sale, letting, partnership, or mandate; and these would be at once enforceable by action: while those agreements unaccompanied by execution, whose nature excluded them from these appellations, would have no legal validity. Those agreements which to consensus add execution, but fail to satisfy the definitions of the Named Real contracts, are thrown into the miscellaneous class called Innominate. We have thus the following classification. Contracts are (1) formal (verbis) and (litteris) or (2) informal, and in the latter case they are either (*a*) consensual, i. e. one of the four contracts established by simple agreement, or (*b*) real (mutuum, commodatum, depositum, pignus), or (*c*) nameless (innominate). Agreements known to us as pacta vestita, § 135, comm. should have been added to class (*a*). To whatever category innominate contracts belonged, do ut des, do ut facias, facio ut des, facio ut facias, they were enforceable by a civil, as opposed to a praetorian, action, called actio in factum praescriptis verbis. Dig. 19, 5, De Praescriptis verbis et in factum actionibus.

The actio in factum praescriptis verbis was so denominated because, in the absence of a generic name for the contract, the fact

begetting the obligation was detailed at length in the beginning of the formula; Actio quae praescriptis verbis rem gestam demonstrat, Cod. 2, 4, 6. Hence it is called actio in factum praescriptis verbis. But at the time when Gaius wrote and till a much later period, this term was not in use, the expression used by the classical jurists for this remedy being not actio, but agere praescriptis verbis. There was indeed no one action in such cases, but a special one was adapted to provide for supplementary cases, which required one, as they arose, where none of the common forms of action were exactly applicable (Sohm, p. 399, n. 4). The action is said to be in factum, because, as it did not belong to any regular class of action, the facts giving rise to it had to be specifically set out, we must not, however, be misled by this to think that it is a kind of action which belongs to the class of actiones in factum, as opposed to actiones in jus conceptae; the actio in factum, we are concerned with, being in jus, not in factum, concepta. This, however, is a misleading name, the formula of the action containing the word 'oportet' (quidquid ob eam rem illum illi dare facere oportet), that is to say, having an intentio in jus, cf. 4 §§ 45, 46. The name of this Roman action ex contractu may be illustrated by a comparison with the name of the old English form of procedure, trespass on the case, so named from the comparative particularity with which the circumstances of the plaintiff's case are detailed in the written allegations. It is sometimes called actio civilis *incerti* because it is brought to recover whatever *damages* (quanti interest) the plaintiff had suffered by reason of the defendant's default. It was an action belonging to the class of actiones bonae fidei. Cf. 4 §§ 18–20, comm.

Examples of Innominate contract are Exchange (permutatio), as if I have conveyed my land to you on the understanding that you are to convey your land to me in return. Sale or hire not coming under the named contracts because the price or hire money have not been definitely fixed, as if I buy and take away a thing from a shop on credit without settling the price, or hire a servant who works for me before the exact amount of his wages has been determined.

When the executed part of an innominate contract was a transfer of property, the plaintiff had alternative remedies, he might either sue the other party for the loss of the thing, which he had conveyed, by condictio causâ datâ, causâ non secutâ, i.e. by a suit to recover property conveyed for a consideration which has failed, or he might bring an action on the contract—praescriptis verbis—claiming damages for the loss arising from its breach. Dig. 19, 5, 5, 1.

It may illustrate the Roman conception of Innominate contract if we indicate the change that has supervened in this matter from

the greater force that is conceded to mere agreement (nuda voluntas) in modern jurisprudence.

With the Romans the execution by one of the parties of his part of an Innominate contract was essential to its efficacy. This execution differentiated the agreement from a nudum pactum and gave it validity, but, naturally, only against the party who had failed to make the return promised. The party who had executed was not similarly bound: he had a right of abandoning the contract and recovering back what he had delivered, not merely when the counter-execution was not made at the time appointed, or had become impossible by the culpa of the other party, or had been always impossible (condictio ob causam non secutam); but when the party who had delivered simply changed his inclination (condictio ex mera poenitentia).

This was due to the exclusive character of the Roman contract system. We find on the contrary in modern Roman law, as it was in force in parts of Germany before the new civil code was enacted, pactum treated as if it had been accompanied by Stipulation, that is, as having the validity given by Form—in other words, no pacta are nuda, all are vestita—and so agreements are enforceable irrespectively of their part-execution: enforceable irrespectively of execution against both parties alike, who herein stand on precisely the same footing: that is to say, the party who has delivered what he had to deliver has no right to recover it back either ex mera poenitentia, or ob causam non secutam, but merely the power to compel the other party to a corresponding performance. Vangerow, § 599.

§ 92. Verbis obligatio fit ex interrogatione et responsione, ueluti DARI SPONDES? SPONDEO: DABIS? DABO: PROMITTIS? PROMITTO: FIDEPROMITTIS? FIDEPROMITTO: FIDEIVBES? FIDEIVBEO: FACIES? FACIAM.
Inst. 3, 15, pr.

§ 92. A verbal contract is formed by question and answer, thus: 'Dost thou solemnly promise that a thing shall be conveyed to me?' 'I do solemnly promise.' 'Wilt thou convey?' 'I will convey.' 'Dost thou pledge thy credit?' 'I pledge my credit.' 'Dost thou bid me trust thee as guarantor?' 'I bid thee trust me as guarantor.' 'Wilt thou perform?' 'I will perform.'

§ 93. Sed haec quidem uerborum obligatio DARI SPONDES? SPONDEO propria ciuium Romanorum est; ceterae uero iuris gentium sunt, itaque inter omnes homines siue ciues Romanos siue peregrinos ualent.

§ 93. The formula, 'Wilt thou solemnly promise?' 'I will solemnly promise,' is only valid between Roman citizens; the others belong to gentile law, and bind all parties, whether Romans or aliens, and, if understood, bind

et quamuis ad Graecam uocem expressae fuerint, ueluti hoc modo ⟨Δώσεις Δώσω· Ὁμολογεῖς; Ὁμολογῶ· Πίστει κελεύεις; Πίστει κελεύω· Ποιήσεις; Ποιήσω⟩, [etiam haec] tamen inter ciues Romanos ualen*t*, si modo Graeci sermonis intellect*um* habeant. et e contrario quamuis Latine enuntientur, tamen etiam inter peregrinos ualent, si modo Latini sermonis intellectum habean*t*. at illa uerborum obligatio DARI SPONDES? SPONDEO adeo propria ciuium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transf*er*ri possit, quamuis dicatur a Graeca uoce figurata esse.

Inst. 3, 15, 1; Theoph. 3, 15, 1.

Romans when expressed in Greek, and aliens when expressed in Latin. The formula, 'Wilt thou solemnly promise (dare spondes)?' is so peculiarly Roman that it cannot be expressed in Greek, though the word 'spondes' is said to have a Greek origin.

§ 94. Vnde dicitur uno casu hoc uerbo peregrinum quoque obligari posse, ueluti si imperator noster principem alicuius peregrini populi de pace ita interroget PACEM FVTVRAM SPONDES? uel ipse eodem modo interrogetur. quod nimium subtiliter dictum est, quia si quid aduersus pactionem fiat, non ex stipulat*u* agitur, sed iure belli res uindicatur.

§ 94. According to some, there is one case in which an alien may be bound by this word, namely, when a Roman emperor in concluding a treaty thus interrogates a foreign sovereign: 'Art thou sponsor for peace?' and the Roman emperor is interrogated in the same way in his turn. But this is a refinement on the law, for the violation of a treaty is not redressed by an action ex stipulatu but by the law of war.

§ 95. Illud dubitari potest, si quis | ———|——.

Dig. 45, 1, 2, and 6.

§ 95. (It may be questioned whether if the question is in the form 'Dost thou solemnly promise?' and the answer to it is simply, 'I promise,' or 'I will give,' any legal obligation is created.)

§ 95 *a*. *Sunt et a*liae obligationes —|———
(*7 uersus in C legi nequeunt*)
———|— corporal ——|——|
———|—— *item* | si debitor mulieris iussu eius, dum ——, | doti dicat quod debet; alius

§ 95 *a*. (There are also other obligations which can be contracted without any antecedent question, as when a woman makes a solemn declaration settling dotal property, movable or immovable, on her betrothed or her

autem obliga*ri* *hoc* modo | non potest. | et ideo si quis ali*us* —— *com*|muni iure obliga ——|—. Epit. 2, 9, 3. See Appendix.

(Cf. Ulp. 6, 2. Dotem dicere potest mulier quae nuptura est, et debitor mulieris si iussu eius dicat; item parens mulieris virilis sexus per virilem sexum cognatione iunctus, velut pater avus paternus.)

husband. And not only can the woman herself be bound in this form, but also her father and her debtor, the latter having to declare that he owes the debt to her future husband as dower. It is only by these three persons that a woman can be legally bound by such a formal promise of dower without any antecedent form of question. Other persons who promise a man dower for a woman can only be made liable in the ordinary legal way, that is, by responding to a question and promising what has been put to them in the form of a stipulation.

§ 96. Item uno loquente —| ——

(3 *uersus in C legi nequeunt*)

———|— haec sol*a* causa *est*, ex qua iureiurando contrahit*ur* | obligatio. sane ex alia nulla causa iureiurando homines obligantur, utique cum quaeritur de iure Romanorum. nam apud peregrinos quid i*u*ris sit, singularum ciuitatium iura requirentes aliud intellegere poterimus —. Epit. 2, 9, 4. See Appendix.

§ 96. There is another case in which an obligation is contracted by a declaration of one of the parties without any previous interrogation, which is when a freedman takes an oath to his patron promising some payment or performance of some function or service, the obligation being created in this case not so much by the form of words as by the sanctity attaching to the oath. This is the only instance in Roman law of an obligation being contracted by means of an oath, though if we searched the particular laws of foreign communities, other instances might be found.)

§ 92. Before we proceed to examine Formal, that is to say, Verbal and Literal contracts, it is desirable to explain the difference between a formal and informal contract.

A Formal Disposition is one for which, under pain of nullification, the necessary or exclusively valid form of expression or manifestation of intention is prescribed by the law. A Formless Disposition is one where the individual is free to choose the form of expressing, or mode of manifesting, his intention.

These accessory formalities and solemnities are ancillary to the essential purpose of the transaction, being destined partly to prevent rash and inconsiderate engagements, partly to furnish evidence and proof of the agreement or principal part of the transaction.

The peculiar characteristic of Formal, that is to say, Verbal and Literal contracts, is this: evidentiary solemnities compose in these contracts an indispensable part of the title to a jus in personam. The Formless contracts, namely, the Real contracts, of which we have already treated, and the Consensual contracts, of which we shall treat hereafter, cannot, of course, be enforced in a court of law unless they are proved to have been concluded, unless, that is, evidence be given of their existence. But the contract and the evidence of the contract are distinct and independent. In Formal contracts a preappointed evidence of the essential portion of the contract, that is, of the intention of the promisor and expectation of the promisee, is made by the law a constituent accessory element of the contract or title itself. It is not perfect or complete without this evidence. If the transaction did not include certain preappointed evidentiary formalities, the Verbal or Literal contract has never been formed and does not exist.

It was the formal contract entered into by question and corresponding answer, called stipulatio, which became the general mode of contracting obligations in Roman law. The time of its introduction into Roman law cannot be ascertained with any exactness. There is no allusion to it in the fragments of the Twelve Tables, or in the references to that law, which have come down to us from Roman times, and as a binding form of contract it was probably not in existence till a somewhat later period. The earliest definite trace of it is in the Lex Aquilia 287 B.C., which contains a special provision concerning additional parties to a stipulation, called adstipulatores, § 115. Various suggestions have been made by modern writers to explain the origin of the stipulation. (See, for these and for the literature on the subject, Muirhead's Roman Law, § 39.) The idea that the stipulation developed in some way out of nexum is now abandoned. It seems more likely that in the form spondes? spondeo, question and answer were first used for religious purposes, and subsequently adopted by law as a means of entering into a legal obligation (cf. Sohm, p. 66, n. 14). The action for enforcing a stipulation was at first confined to cases in which certa pecunia or certa res was thus promised, though afterwards it was applicable also to uncertain claims, the action being condictio, which was stricti juris. But the characteristic of the stipulation, which made it in course of time a form for creating any kind of obligation, was that the promise contained in it, though unilateral, might be conditional. A condition was not annexable to all dispositions.

It was annexable to all Testamentary dispositions; but among formal dispositions inter vivos the only one to which it could be annexed was formation of contract by Stipulation.

We have seen that conditions were excluded from Expensilatio or Literal Contract: it was their admissibility in Stipulatio that made the latter, unlike Expensilatio, a generic or universal form of contract: a contract equally applicable whatever the object that the contractors desired to secure. Primitive jurisprudence, as we have noticed, only recognized stipulations, whose object was a dare or conveyance of property; not stipulations whose object was a facere or non-facere, some other kind of performance or forbearance. But when facere or non-facere was allowed to form the condition of an obligation, whose object was a dare, and so, when the payment of a penalty could be made contingent on the performance or non-performance of a certain act, it became possible to stipulate, virtually or indirectly at least, for facere or non-facere as well as for dare. Inst. 3, 15, 7. Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. Et in hujusmodi stipulationibus optimum erit poenam subicere, ne quantitas stipulationis in incerto sit ac necesse sit actori probare, quid ejus intersit; itaque si quis ut fiat aliquid stipuletur, ita adici poena debet: 'si ita factum non erit, tum poenae nomine decem aureos dare spondes?' sed si quaedam fieri, quaedam non fieri una eademque conceptione stipuletur, clausula erit hujusmodi adicienda: 'is adversus ea factum erit sive quid ita factum non erit, tunc poenae nomine decem aureos dare spondes?'

The form of the stipulation, not being in writing or attested by witnesses, must have been often found imperfect for evidentiary purposes. Accordingly we find that it was not uncommon in the time of the classical jurists for the parties to a stipulation to draw up a written memorandum of its contents, called cautio, and in later times, under the Byzantine Emperors, there was an increasing tendency to lay stress on the cautio of the stipulation rather than on the stipulation itself, to which the eastern part of the empire may not have been well accustomed. Hence we find the law on this subject laid down by Justinian to be, that if a written memorandum embodying the terms of a stipulation is proved by the plaintiff, the parties are presumed to have actually entered into a stipulation, unless the defendant can show that he was absent on the day from the place where the stipulation is said to have been entered into, Inst. 3, 19, 12.

The principal peculiarity that results from the nature of formal contract, and so of that of the verbal and literal contracts of Roman law, which distinguishes them from informal contracts is, that informal contracts are not legally valid unless the ground on account of which the promise is made is shown; whereas verbal and literal contracts, securing by the solemnity of their formalities

due deliberation on the part of the contractors, are valid in favour of the promisee apart from their object. See Appendix to this Book.

Although, however, a mere abstract promise in a stipulation apart from its object was binding, as e.g. do you promise to pay 10 aurei? I do promise,—yet in course of time, a defendant who had been induced to enter into a stipulation by fraud, or who had not received the consideration, on account of which his promise was made, was allowed to plead the exceptio doli or plea of fraud, an equitable defence, probably introduced by Aquilius Gallus (cf. Moyle's Inst. App. 8, Bk. 3). By this means the circumstances which gave rise to the promise would be brought into consideration in the action. The practice of giving a written acknowledgment or cautio for loans of money grew common, and, as has been mentioned, great evidentiary importance came to be attached to such written documents, especially in the eastern part of the empire.

If, instead of generally alleging fraud (Si in ea re nihil dolo malo Auli Agerii factum est neque fit), the plea of the defendant who was sued on such an acknowledgment alleged the particular fact of his never having received the alleged loan (exceptio in factum composita), it was called, in later imperial times, exceptio non numeratae pecuniae. Cod. 4, 30, 1, 3. Compare 4 § 116 Si stipulatus sim a te pecuniam, tanquam credendi causa numeratus, nec numeraverim . . . placet per exceptionem doli mali te defendi jubere with Inst. 4, 13, 2 Si quis, quasi credendi causa, pecuniam stipulatus fuerit, neque numeraverit . . . placet per exceptionem pecuniae non numeratae te defendi jubere.

An important peculiarity of the exceptio non numeratae pecuniae was that the burden of proof was not, as in other exceptions, on the defendant, but on the plaintiff, who would have to prove in the first place the payment of the money to the defendant for which he was suing. This plea might therefore have the practical effect of transforming a loan of money due on a formal contract into a real contract, but this was confined to contracts contemplating a loan of money. But by a constitution of the Emperor Diocletian (Hermogen. Cod. 1; Cod. Theod. 2, 27, 1; Cod. Just. 4, 30), if a written acknowledgment of a debt was thus sued on, the exceptio non numeratae pecuniae could only be pleaded within five years from the date of the contract, which delay was reduced to two years by Justinian, after which interval the cautio was accepted, if we are to follow the statement of the law made in the Institutes, as incontrovertible, and not merely presumptive, proof that the money had been advanced. After this interval, accordingly, Justinian regards the written document as a formal contract and not simply as evidentiary.

If no written document accompanied a promise by stipulation to

repay a debt, no length of time barred the defendant from pleading the exceptio doli. If the plaintiff, instead of suing on the Stipulatio, sued simply on a loan by the informal real contract of mutuum, the defence of the defendant, though substantially the same, viz. that he had never received the money, being a mere contradiction of the intentio, would not appear in the formula in the shape of an exceptio. In this case the burden of proof that the money had been actually lent would naturally fall on the plaintiff. (For the circumstances under which a defence took the form of exceptio see 4 § 115.)

It may assist us in understanding the distinction of Formless and Formal contracts, that is Verbal and Literal, if, before we quit this subject, we cast a hasty glance at the corresponding institutions of English law.

In the eye of the English law, contracts are either Simple (parol), that is, enforceable only on proof of consideration, or Special, that is, binding by the solemnity of their form. Special contracts are either contracts under Seal or contracts of Record. A common species of Deed, or written contract under seal, is the Bond or Obligation, which, like Stipulatio, is used to secure the payment of money or performance of any other act, and, like Stipulatio, either binds the debtor alone or the debtor and sureties. It consists of an obligatory part or penal clause binding the obligor to pay a sum of money, and a condition added, that if he does some particular act the obligation shall be void, but else shall remain in full force.

Contracts of Record are either recognizances or Judgment debts.

A Recognizance is an acknowledgment before a court or magistrate that a man owes the King or a private plaintiff (as the case may be) a certain sum of money, with a condition avoiding the obligation to pay if he shall do some particular act, as, if he shall appear at the assizes, keep the peace, pay a certain debt, or the like. A Recognizance resembles Stipulation in its form, being entered into by oral interrogation and answer, but differs in that it can only be taken before a court or magistrate duly authorized, whereas stipulatio was transacted between private parties.

A Judgment debt, or debt due by the judgment of a court of record, is sometimes the result of a judgment in an adverse suit, but sometimes it is merely a form of written contract, and may be entered into in various ways. A fictitious action is brought, and the party to be bound either makes no reply, or fails to instruct his attorney, or confesses the action and suffers judgment to be at once entered up; or the party to be bound consents to a judge's order

authorizing the plaintiff to enter up judgment and issue execution against him, either at once and unconditionally, or on a future day conditionally on non-payment of whatever amount may be agreed upon; or the party to be bound gives a warrant of attorney, that is, authority to an attorney to confess an action of debt or suffer judgment to go by default, the warrant being accompanied by a defeasance declaring it to be merely a security for payment of a certain sum and interest, and providing that no execution shall issue unless default in the payment shall have been made.

The conjunction of a penal clause and a condition avoiding it is common to the judgment debt, recognisance, bond, and stipulatio poenae nomine. The Roman Nexum, as we have stated, had apparently the effect of a Judgment debt; being a transaction per aes et libram it could not itself be conditional.

§ 93. Why was Sponsio binding on Romans and not on strangers? Possibly because originally it was an oath or adjuration of the tutelary gods of Rome, who would not be an object of reverence to a stranger.

§ 94. The obligation of an independent sovereign state to another independent sovereign state does not exactly resemble the obligation of one subject to another subject of the same sovereign or political superior. If a contract between two subjects is broken, it is enforced by the power of the common sovereign. But if a treaty between two sovereigns is violated, there is, by hypothesis, no common superior by whom it may be enforced. The treaties of sovereign states give rise to moral obligations similar to those of individuals. They may be binding in the forum of conscience or of heaven, but, if these are disregarded, are not enforced by any earthly tribunal. The moral obligation is not secured by any strictly legal sanction; and the sovereign whose treaty rights are violated can obtain no redress except from the force of international opinion and his own power of inflicting evil on the violator.

Or we may compare the relation of sovereign states to the relation of individuals before the complete establishment of political society. There is then sufficient intercourse to form a public opinion and certain conceptions of rights and wrongs; but not sufficient organization to dispense with the necessity of self-vindication or self-defence. In such a state the redress of the individual for the harms he suffered was by feud or private war. That such a state once existed we know from the early history of our ancestors and their Teutonic kinsmen. So the redress of sovereigns is war or public feud. In the controversies of individuals the system of private war was abolished in this country by the proclamation of 'the king's peace,' renewed at every coronation—the symbol of the consolidation

of central authority. For the controversies of peoples no such abrogation of warlike process seems possible.

Jus in the expression jus belli may perhaps signify not so much right or law in the ordinary sense as sanction, or executive power, or means of compulsion. That this was one of the many meanings of the word appears from Ovid, who uses the following terms to express a want of self-control: Nam desunt vires ad me mihi jusque regendum. Amores, 2, 4.

The necessity of employing any consecrated terms in a stipulation was abrogated by a constitution of Leo, dated the calends of January, A. D. 469. Omnes stipulationes, etiamsi non sollemnibus vel directis, sed quibuscunque verbis pro consensu contrahentium compositae sint, legibus cognitae suam habeant firmitatem, Cod. 8, 37, 10. 'Stipulations, though not in solemn formulas or direct terms, in whatever words the agreement of the parties is expressed, if otherwise legal, shall have binding force.'

Dotis dictio is not a contract, being simply a solemn binding promise of dos made by a woman, who is betrothed or married, or by some person on her behalf, who is under an obligation to provide her with dos. It is distinguished from dotis promissio, a promise by stipulation to give dos, which any one might undertake. In later law dotis dictio was obsolete, but by a constitution of the Emperor Theodosius II any third person was made capable of binding himself by a simple promise of dower without a stipulation, and this law was adopted by the Emperor Justinian. 1 Cod. 5, 11, 6.

Jurata promissio liberti was the sworn promise of a freedman, immediately after his manumission, to render certain services (operae) to his patron. It was usual to bind the conscience of the slave by a similar promise before manumission; but such a promise had no legal operation. The right of a patron to the operae of his freedman was put an end to by the capitis diminutio of either patron or freedman, § 83, patronatus being assimilated to agnatio.

§ 97. Si id quod dari stipulamur tale sit, ut dari non possit, in*u*tilis est stipulatio, uelut si quis hominem liberum quem seruum esse credebat, aut mortuum quem uiuum esse credebat, aut locum sacrum uel religiosum quem putaba*t* humani iuris esse, dari ⟨*stipuletur*.
Inst. 3, 19, 1.

§ 97. If we stipulate that something is to be conveyed to us which cannot be, the stipulation is void; for instance, if a man stipulates for the conveyance of a freeman whom he supposes to be a slave, or of a dead slave whom he supposes to be alive, or of ground devoted to the celestial or infernal gods which he supposes to be subject to human law.

§ 97 *a*. *Item si quis rem quae in rerum natura esse non potest, uelut hippocentaurum,*⟩ stipuletur, aeque inutilis est stipulatio. Inst. l. c.

§ 97 *a*. Or again if a man stipulates for a thing incapable of existing, such as a hippocentaur, the stipulation is void.

§ 98. Item si quis sub ea condicione stipuletur quae existere non potest, ueluti si digito caelum tetigerit, inutilis est stipula*tio*. sed legatum sub inpossibili *c*ondicione relictum nostri praeceptores proinde deberi putant, ac si sine condicione relictum esset; diuers*ae* scholae auctores n*ihil*o minus legatum inutile existimant quam stipulationem. et sane uix idonea diuersitatis ratio reddi potest. Inst. 3, 19, 11.

§ 98. An impossible condition, that the promisee, for instance, should touch the sky, makes the stipulation void, although a legacy with an impossible condition, according to the authorities of my school, has the same effect as if no condition were annexed. According to the other school it is as null and void as if it were a stipulation, and in truth no satisfactory reason can be alleged for making a distinction.

§ 99. Praeterea inutilis est stipulatio, si quis ignorans rem sua*m* esse dari sibi eam stipuletur; quip*pe* quod alicuius est, id ei dari non potest.

§ 99. So when a person stipulates by mistake that his own property shall be conveyed to himself, the stipulation is null and void, for what already belongs to a man, cannot be conveyed to him.

§ 100. Denique inutilis est talis stipulatio, si quis ita dari stipuletur POST MORTEM MEAM DARI SPONDES; uel ita ⟨*POST MORTEM TVAM DARI SPONDES?*; *ualet autem, si quis ita dari stipuletur* *CVM MORIAR DARI SPONDES?* *uel ita*⟩ CVM MORIERIS DARI SPONDES? id est ut in nouissimum uitae tempus stipulatoris aut promissoris obligatio conferatur. nam inelegans esse uisum est ab heredis persona incipere obligationem. rursum ita stipulari non possumus PRIDIE QVAM MORIAR, aut PRIDIE QVAM MORIERIS DARI SPONDES? quia non potest aliter intellegi 'pridie quam aliquis morietur,' quam si mors secuta sit; rursus morte secuta in praeteritum reducitur stipu-

§ 100. A stipulation to convey after the death of the promisee or promisor is invalid, but a stipulation to convey at the death, that is, at the last moment of the life of the promisee or promisor, is valid. For it has been held anomalous to make the heir of either of the contracting parties the first subject of the obligation. Again, a stipulation to convey on the day before the death of the promisee or promisor is invalid, for the day before the death cannot be ascertained till after death, and after death the stipulation has a retrospective effect, and amounts to a promise to convey to the promisee's heir, which is void.

latio et quodammodo talis est HEREDI MEO DARI SPONDES? quae sane inutilis est.
Inst. 3, 19, 13.

§ 101. Quaecumque de morte diximus, eadem et de capitis deminutione dicta intellegemus.

§ 101. What is said of death must also be understood of capitis deminutio.

§ 102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit, non responderit, ueluti si sestertia X a te dari stipuler et tu sestertia V promittas, aut si ego pure stipuler, tu sub condicione promittas. Inst. 3, 19, 5.

§ 102. Another cause of nullity is the want of correspondence between the question and answer; if I stipulate, for instance, for ten sestertia and you promise five, or if you meet my absolute stipulation by a conditional promise.

§ 103. Praeterea inutilis est stipulatio, si ei dari stipulemur, cuius iuri subiecti non sumus. unde illud quaesitum est, si quis sibi et ei cuius iuri subiectus non est dari stipuletur, in quantum ualeat stipulatio. nostri praeceptores putant in uniuersum ualere et proinde ei soli qui stipulatus sit solidum deberi, atque si extranei nomen non adiecisset. sed diuersae scholae auctores dimidium ei deberi existimant, pro altera uero parte inutilem esse stipulationem. Inst. 3, 19, 4.

§ 103. No valid stipulation can be made to convey a thing to a third person to whose power the stipulator is not subject, whence the question has been mooted to what extent a stipulation in favour of the stipulator and such a stranger to the contract is valid. My school hold that it is valid for the whole amount stipulated, and that the stipulator is entitled to the whole, just as if the stranger had not been mentioned. The other school hold that he is only entitled to one moiety, and that the stipulation is of no effect as to the other.

103 *a*. Alia causa est |—— DARI SPONDES? | —— solidum deberi et me | sol*um* —— etiam Tit*i*|o —.

§ 103 *a*. It is a different case if you promise to convey something to me or Titius, for then the whole is due to me, and I alone can sue on the stipulation, though the debt may be discharged by payment to Titius.

§ 104. *Praeterea* inutilis est stipulatio, si ab e|o stipuler qui iuri meo subiectus est, item si is a me stipuletur. ⟨*sed*⟩ seruus quidem et qui in mancipio est et *filia familias* et quae in manu est non solum ipsi, cuius iuri subiecti subiectaeue sunt, obligari non possunt, sed ne alii quidem ulli. Inst. 3, 19, 6.

§ 104. No valid stipulation can be made between a person under power and the person to whom he is subject. In fact a slave, a person in domestic bondage (mancipium), a daughter of the family and a wife subjected to the hand of a husband, can incur an obligation neither to the person in whose power or mancipium they are, nor to any other person.

§ 105. Mutum neque stipulari neque promittere posse palam est. idem etiam in surdo receptum est; quia et is qui stipulatur uerba promittentis, et qui promittit uerba stipulantis exaudire debet.
Inst. 3, 19, 7.

§ 105. The dumb cannot stipulate or promise, nor can the deaf, for the promisee in a stipulation must hear the answer, and the promisor must hear the question.

§ 106. Furiosus nullum negotium ger*er*e potest, quia non intellegit quid agat.
Inst. 3, 19, 8.

§ 106. A lunatic cannot enter into any transaction because he does not understand what he is doing.

§ 107. Pupillus omne negotium recte gerit, *ut* tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur ⟨*tutor*⟩, ueluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest.
Inst. 3, 19, 9.

§ 107. A ward can enter into any transaction provided that he has his guardian's sanction when necessary, as it is for his incurring an obligation for himself, although not for his imposing an obligation on another.

§ 108. Idem iuris est in feminis quae in tutela sunt.

§ 108. The same rule applies to women who are wards.

§ 109. Se*d* quod diximus de pupillo, utique de eo uerum est qui iam aliquem intellectum habet. nam infans et qui infanti proximus est non multum a furioso differt, quia huius aetatis pupill*i* nullum intellectum habent; sed in his pupillis *propt*er utilitatem benignior iuris interpretatio facta est. Inst. 3, 19, 10.

§ 109. But what we have said about a pupil is of course only true of one who has some understanding: for infants and those who are bordering on infancy do not differ much from insane persons, not being capable of judging for themselves; nevertheless, when they will benefit by the transaction, a more accommodating interpretation is put on the law.

Among the objects that could not be secured by stipulation, and still less by any Formless contract, are Dispositions under the code of Family law (the laws governing domestic relations) or the code of Succession. E.g. no promise of marriage (sponsalia) was legally binding—a striking contrast to the rule of English law. Nor do we hear of any binding agreement to a future Emancipation, Adoption, or Arrogation; or for the principal acts relating to the law of Succession, to the execution of a Will or to the aditio of an inheritance. In all these solemn Dispositions the Roman legislator deemed it expedient that the disposer should have an entire freedom of choice at the moment of making the Disposition.

§ 98. This seems an appropriate place for the following remarks

on the general nature of conditions. A Condition is an element of Title; it is a certain contingent occurrence or non-occurrence, performance or non-performance, by arbitrary appointment conferring on a certain person a certain right, or imposing on him a certain duty. It may be defined as the middle term (B) of a syllogism of which the minor term (C) represents a person, and the major term (A) a right or duty, and of which both the premisses are contingent. It is the last feature that we shall first proceed to consider.

The major premiss must be contingent; it must be an arbitrary determination that makes the right or duty (A) depend on the given title (B); the nexus between the middle and major terms must be solely the will of the testator or contractors, not the will of the legislator; the title must not be in its own nature the Necessary presupposition of the right. E. g. in the following cases: the institution of a person as heir, *if he survive the testator*, *if he accept the inheritance;* the bequest of a legacy, *if the heir accept the inheritance;* the promise of a dower, *if the marriage is celebrated;* the seeming condition is required by the law, and its expression is superfluous: such an event, therefore, is not a genuine condition. Again, the nexus between the minor and middle terms may be either the will of the person entitled (conditio potestativa), Cod. 6, 51, 7, or chance (conditio casualis); but one way or other the minor premiss must be contingent; the fulfilment of the condition must be neither Necessary nor Impossible: it must be a future and uncertain contingency whether the title (B) shall be realized or fulfilled in respect of a given person (C). The condition, accordingly, must not be a past or present event, e.g. *if Titius was consul last year*, *if Titius is now consul;* such a fact is now certain and Necessary, and any disposition contingent thereon is really unconditional.

The effect of an Impossible condition is different in Contracts and Testamentary dispositions; it invalidates contract; whereas in a testament it is deemed unwritten (pro non scripto habetur), and the disposition is regarded as unconditional. This was the rule that finally prevailed, Dig. 35, 1, 3. 'It has been finally decided that impossible conditions to testamentary dispositions are mere surplusage.' This was the doctrine of the Sabinians, and was confirmed by Justinian, Inst. 2, 14, 10. Illegal and immoral conditions followed the same rule as impossible conditions. The question why Contracts and Wills were governed by different rules, which Gaius admits to be obscure, may receive some light from the following considerations. Testamentary dispositions in their nature are acts of liberality on the part of the testator. Even when he employs them as inducements to an illegal or immoral act, it is not

quite certain that the refusal to perform the act would have caused him to deprive the person to whom the bequest is given of his liberality. At all events, this person is himself innocent of unlawful intention, and the same cannot be said of the contractor who is guilty of an agreement to violate the law. Accordingly, the law aids the one but not the other; and the rule, once established for immoral conditions, was extended to impossible conditions.

On this point the French code agrees with the Roman law. In the Austrian code the Proculian doctrine is followed: i. e. testamentary dispositions as well as contracts are invalidated by immoral or impossible conditions. The Prussian code, till it was superseded by the German civil code, followed a middle course: impossible conditions invalidated a testamentary disposition; immoral conditions were deemed unwritten and the disposition construed as unconditional. The German civil code does not lay down any special rules as to the effect of impossible or immoral conditions attached to testamentary dispositions, treating testamentary dispositions in the same way in this respect as other dispositions. A disposition to which an immoral or unlawful disposition is attached is void, whether it be a condition precedent or subsequent. A disposition to which an impossible condition precedent is attached is void: a disposition to which an impossible condition subsequent is attached is looked upon as if no condition were attached to it.

A Condition was not annexable to all dispositions. It was annexable to all Testamentary dispositions: but among formal dispositions inter vivos the only ones to which it could be annexed were Stipulations. A Condition could not be annexed to an In jure cessio or surrender before the magistrate: Nulla legis actio prodita est de futuro, Frag. Vat. 49. Nor to Mancipatio, nor to Acceptilatio, nor to Expensilatio (Literal Obligation), nor to Cognitoris datio. Sub conditione cognitor non recte datur, non magis quam mancipatur, aut acceptum vel expensum fertur, Frag. Vat. 329. Nor could it be annexed to magisterial Tutoris datio: Sub conditione a praesidibus provinciarum non posse dari tutorem placet, et si datus sit nullius esse momenti dationem, Dig. 26, 1, 6, 1: nor to Tutoris auctoritas, Dig. 26, 8, 8: nor to hereditatis aditio, nor to servi optio: Actus legitimi qui non recipiunt diem vel conditionem, veluti mancipatio, acceptilatio, hereditatis aditio, servi optio, datio tutoris, in totum vitiantur per temporis vel conditionis adjectionem, Dig. 50, 17, 77.

Later jurisprudence admitted the annexation of conditions to the alienation of property by means of Tradition. Conditions are Suspensive or Resolutive. Tradition coupled with a Suspensive

condition operates an immediate transfer of possession and a future transfer of ownership contingent on, and contemporaneous with, the fulfilment of the condition. Tradition, coupled with a Resolutory condition, operates two transfers of ownership: an immediate transfer of ownership and a subsequent retransfer of ownership, contingent on, and contemporaneous with, the fulfilment of the condition. The retransfer of ownership follows without any retradition or reconveyance by the interim proprietor; and the remedy of the original proprietor is not condictio, implying the necessity of reconveyance, but vindicatio, implying that he is already reinvested with ownership. The justa causa or disposition which accompanies the tradition and determines the transfer of ownership (2 § 20) also limits the duration of the ownership so transferred. Such at least is the doctrine of the majority of jurists: others hold that the fulfilment of the resolutive condition only imposes on the transferree a personal obligation of reconveyance.

Conditions annexed to contracts have the following difference from conditions annexed to testamentary dispositions and dispositions translative of dominion. Conditions annexed to contract are retroactive: the obligation determined by their fulfilment relates backward and dates from the date of the contract. Conditions annexed to legacy or to alienation are not retroactive: the obligation or ownership thereby conferred only dates from the fulfilment of the condition.

§§ 100–103. As to the rights conferred or obligations imposed by a contract on third persons not parties to the contract Paulus lays down the following principle: Quaecunque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum efficiunt: et ideo neque stipulari neque emere vendere contrahere, ut alter suo nomine recte agat, possumus, Dig. 44, 7, 11, i.e. in every contract the right created by the contract must primarily vest, if the contract is to be valid, in the promisee himself; and the obligation in the promisor himself, for Roman law did not, it must be remembered, admit the principle of contractual agency. This rule is evidently not violated if the promisee associates to himself his heir, i.e. contracts for some right to himself and heir: Suae personae adjungere quis heredis personam potest, Dig. 45, 1, 38, 14: but it is violated if the promisee contracts for some right to vest exclusively in his heir, or, as expressed in this paragraph, for some performance post mortem suam. Such contracts accordingly were void, whether they belonged to jus civile or the jus gentium, § 158. This led to the introduction of an Adstipulator when a person wished to stipulate something exclusively for the benefit of his heir, § 117. When Justinian abrogated the rule and

ordained that an act could be contracted to be performed either before or after the death of either of the contractors, Cod. 4, 11, 1, the Adstipulator became unnecessary.

The rule of Paulus would make a promise of payment to the promisee and a stranger, § 103, void as to the latter, so that the promisee would only take a moiety, the law being thus stated in the corresponding passage of the Institutes, Inst. 3, 19, 4. But in a formless contract of sale the Sabinian doctrine still prevailed. Dig. 18, 1, 64.

The same rule applied to the passive obligation a contract imposed: the debtor created by a contract could not be in the first instance the heir of the promisor, § 158. One intelligible motive for prohibiting obligations from taking effect on the death of the promisor would be to prevent evasions of the testamentary laws restricting the powers of testation. A testator who wished to leave a legacy to a person who could not take under a will from want either of Capacitas or of passive Testamentifactio, or a legacy beyond the amount permitted by the lex Falcidia or some other law, would enter into a Stipulation, binding his heir to pay a certain sum after the death of the promisor. The promisee then could recover this sum not as legatee but as creditor under the stipulation. That such evasions were in fact attempted appears from Dig. 22, 3, 27. But this opening of a door to fraudulent evasions is not what Gaius, § 100, intends to express by 'Inelegance,' which means something not in accordance or in harmony with legal principle, the principle in this case being that a contract is confined in its operation to the parties to it, and that the heir can only be entitled to the rights and liable to the obligations of the deceased by way of succession. Justinian, however, abolished the distinctions recorded in this paragraph, and allowed the stipulation of an act to be performed either for the heir of the promisee, or by the heir of the promisor, Inst. 3, 19, 13. (§ 102. According to Dig. 45, 1, 1, 4 and 83, 3 the stipulation in this case is not void, but good for the smaller amount. The Institutes of Justinian (3, 19, 5), on the other hand, adopt the view of the law taken by Gaius, perhaps inadvertently.)

A slave or filiusfamilias who stipulated a payment to himself acquired a right for the master or paterfamilias. Except in these relations, it was the rule that a man could not stipulate for a third person. Payment, however, to a third party might be stipulated for, so as to entitle the third party to receive it, Inst. 3, 19, 4, and such payment might be secured by a penal clause, stipulating, in default of performance, payment of a penal sum to the promisee, Inst. l. c. 19.

The rule of the Civil law that a Formal contract by Stipulatio could only be concluded between principals—between persons cove-

nanting in their own names, was an impediment in the way of commerce which was met, as we have already stated, by a double use of a Consensual contract, which will presently be examined, the contract of Agency (mandatum). An Agent or mandatary stipulated in his own name with a third person, and then assigned his right of action to his principal; that is, gave his principal a mandate to sue in his name, but on his own account (in rem suam), 2 § 38: the principal then sued and recovered on the stipulation as assignee of the action, that is, as mandatary of his mandatary. In the latest period the actual mandate of the action was unnecessary if an intention to assign was shown: the praetor allowing the principal in such cases to sue in his own name by an actio Utilis, i.e. by a formula perhaps containing some kind of Fiction, Dig. 2, 14, 16 pr., Cod. 4, 10, 1, cf. Sohm, p. 443, n. 2. Nor in respect of Formless contracts, or contracts governed by Jus Gentium, was the principle of contractual Agency more completely recognized, as has sometimes been supposed. But if an Agent merely acted as emissary (nuncius) and instrument (minister) of his principal, that is, communicated the intention of an absent principal, the principal was himself a party to the obligation and acquired an immediate right against the other contractor and incurred a direct obligation to him: he could sue him or be sued by him in an actio Directa. See § 162, comm.

If it was desired to give a third person the right of suing on the contract, it was necessary that the contractor should contract as principal, and then assign his right of action to the third party, but the latter was subject to the same defences, as could have been used against the assignor, who was the contracting party. If he neglected the precaution of making such assignment it followed that the third party could not recover on such contract. Paulus, Dig. 44, 7, 11, lays down this principle which we have already, § 100, noticed: 'Every disposition in which a person contracts as principal but attempts to entitle a third person to sue as principal (i.e. attempts to invest a third person with the rights of an immediate creditor) is invalid: and neither by formal contract of stipulation, nor by formless contract of purchase and sale, nor by any other contract in which I am principal can I invest a third person with a right to sue in his own name.' But by binding the promisor to pay a penalty to the stipulator, if something was not rendered to the third party, the object of the parties might be secured. Cf. Inst. 3, 19, 19. Alteri stipulari, ut supra dictum est, nemo potest: inventae sunt enim hujusmodi obligationes ad hoc, ut unusquisque adquirat quod sua interest; ceterum si alii detur, nihil interest stipulatoris. Plane si quis velit hoc facere, poenam stipulari conveniet, ut, nisi ita

factum sit, ut comprehensum esset, committetur poenae stipulatio etiam ei cujus nihil interest.

It is to be remembered too that the want of contractual agency was to a great extent supplied by the rule that contractual rights acquired by slaves or filiifamilias were acquired for their superior. We have already mentioned, § 100, that in Justinian's legislation a contractor could contract for a payment to or by a third person, when that person was his own heir.

§§ 105, 106. For the same reasons as those given in the text, neither deaf nor dumb persons could make, or be witnesses to, a mancipatory will. Persons thus physically incapable, as well as lunatics, might be represented for some purposes by curators. The contract of a lunatic, it is to be noticed, is not voidable, as in English law, but void, 'quia non intellegit quid agat.'

§ 109. The age of puberty, as we have seen, came to be fixed at 14 for males, 12 for females. Before this period the child was called impubes: but the capacity of the impubes varied with his age. Up to the age of 7 he was infans; in the interval between 7 and 14 he was described either as infantiae proximus or as pubertati proximus. According to some commentators the interval was equally divided between these appellations, so that from 7 to 10½ a boy was infantiae proximus, and from 10½ to 14 pubertati proximus. According to Savigny these names only covered the space of a year measured from each limit, so that from 7 to 8 a child was infanti proximus, from 13 to 14 puberi proximus, and from 8 to 13 without any distinctive appellation. Cf. 1, 142, comm.

§ 110. Possumus tamen ad id quod stipulamur alium adhibere, qui idem stipuletur; quem uulgo adstipulatorem uocamus.

§ 110. Although another person cannot stipulate for us, yet in our stipulations we can associate with ourselves another person who stipulates for the same performance, and is called an adstipulator.

§ 111. *Et* huic proinde actio conpetit proindeque ei recte soluitur ac nobis; sed quidquid consecutus erit, mandati iudicio nobis restituere cogetur.

§ 111. He can sue as well as the stipulator, and payment to him discharges the debtor as well as payment to the stipulator, but whatever he recovers, the action of mandate compels him to hand over to the stipulator.

§ 112. Ceterum potest etiam aliis uerbis uti adstipulator, quam quibus nos usi sumus. itaque si uerbi gratia ego ita stipulatus sim DARI SPONDES?, ille sic adstipulari potest IDEM

§ 112. The adstipulator need not employ the same terms as the stipulator; if the one says, 'Art thou sponsor for the conveyance?' the adstipulator may say, 'Dost thou for the same

FIDE TVA PROMITTIS? uel IDEM FIDEIVBES? uel contra.

pledge thy credit?' or, 'Dost thou for the same bid me trust thee?' or vice versa.

§ 113. I*t*em *m*inus adstipulari potest, plus non potest. itaque si ego sestertia X stipulatus s*i*m, ille sestertia V stipulari potest; contra uero plus non potest. item si ego pure stipulatus sim, ille sub condicione stipulari potest; contra uero non potest. non solum autem in quantitate, sed etiam in tempore minus et plus intellegitur; plus est enim statim aliquid dare, minus est pos*t* tempus dare.

§ 113. He may contract for less than the stipulator, but not for more. Thus, if I stipulate for ten sestertia he may stipulate for five, or if I stipulate absolutely he may stipulate conditionally, but not vice versa. More and less is to be understood of time as well as of quantity, immediate payment being more, and future payment being less.

§ 114. In hoc autem iure quaedam singulari iure obseruantur. nam adstipulatoris heres non habet actionem. item seruus adstipulando nihil agit, qu*amuis* ex ceteris omnibus causis stipulatione domino adquir*at*. id*em* de eo qui in mancipio est magis placuit; nam et is serui loco est. is autem qui in potestate patris est agit aliquid, sed parenti non adquirit, quamuis ex omnibus ceteris causis stipulando ei adquirat. ac ne ipsi quidem aliter actio *con*petit, quam si sine *capitis* d*e*minutione exierit de potestate parentis, ueluti morte eius aut quod ipse flamen Dialis inauguratus est. eadem de fili*a* familias et quae in manu est dicta intellegemus.

§ 114. In this institution there are some exceptional rules. The heir of the adstipulator cannot sue; a slave cannot be adstipulator, though in any other circumstance his stipulation acquires a right for his master; moreover it is the prevalent opinion that a person in domestic bondage cannot be adstipulator, because he is likened to a slave; a son in the power of his father can be adstipulator, but does not acquire a right for his father, as in all other stipulations, and he himself has no right of action until, without capitis diminutio, he ceases to be subject to his father, as by his father's death, or by being inaugurated priest of Jupiter. The same is true of a filiafamilias and a wife in the manus of her husband.

§ 115. Pro eo quoque qui promittit solent alii obligari; quorum alios sponsores, alios fidepromissores, alios fideiussores appellamus.

Inst. 3. 20 pr.

§ 115. For the promisor, similarly, other persons are bound, who are called sponsors or fidepromissors or fidejussors.

§ 116. Sponsor ita interrogatur IDE*M* DARI SPONDES? fidepromissor ⟨*ita*⟩ IDEM FIDE-

§ 116. A sponsor is thus interrogated: 'Art thou for the same payment sponsor?' a fidepromis-

PROMITTIS? fideiussor ita ID*EM* FIDE TVA ESSE IVBES? uidebimus [de his] autem, quo nomine possint proprie appellari, qui ita interrogantur ID*EM* DABIS? ID*EM* PROMITTIS? IDEM FACIES?

sor thus: 'Dost thou for the same pledge thy credit (fidei-promittis)?' a fidejussor thus: 'Dost thou the same guarantee (fide tua jubes)?' We shall have to consider the question what is the proper name for those who are thus interrogated: 'Wilt thou convey the same? Dost thou promise the same? Wilt thou do the same?'

§ 117. Sponsores quidem et fidepromissores et fideiussores saepe solemus accipere, dum curamus, ut diligentius nobis cautum sit; adstipulatorem uero fere tunc solum adhibemus, cum ita stipulamur, ut aliquid post mortem nostram detur. ⟨——⟩ stipulando nihil agimus, adhibetur a*ds*tipulator, ut is post mortem nostram agat; qui si quid fuerit consecutus, de r*estitue*ndo eo mandati iudicio heredi [meo] tenetur.

§ 117. Sponsors and fidepromissors and fidejussors are often employed to provide additional security for a debt; an adstipulator is generally only employed by us to secure payment after our death. Our own stipulation for this purpose is void, and therefore we associate with ourselves an adstipulator, in order that he may sue on the contract after our death, but he is compelled by an action of mandate to hand over to our heir whatever he recovers.

§ 118. Sponsoris u*ero* et fidepromissoris similis condicio ⟨*est*⟩, fideiussoris ualde dissimilis.

§ 118. The rules which govern the sponsor and fidepromissor are similar, and very unlike those which govern the fidejussor.

§ 119. Nam illi quidem nullis obligationibus accedere possunt nisi uerborum, (quamuis interdu*m* ipse qu*i* promiserit non fuerit obligatus, uelut si *mulier* aut pupillus sine tutoris auctoritate aut quilibet po*st* mortem suam dari promiserit. at illud quaeritur, si seruus aut peregrinus spoponderit, an pro eo sponsor au*t* fidepromissor obligetur). Inst. 3, 20, 1.

§ 119. For the former are accessory to none but verbal contracts, and are sometimes even liable when the principal promisor himself is not so, as, for instance, when a woman or ward contracts without her guardian's sanction, or when a person promises a payment after his own death. But it is a moot question when a slave or alien promises by the term spondeo, whether his sponsor or fidepromissor is effectively bound.

§ 119 *a*. Fideiussor uero omnibus obligationibus, id est siue re siue uerbis siue litteris siue consens*u* contractae fuerint obligationes, adici potest. *ac* ne illud quidem interest, utrum ciuilis a*n* naturalis obligatio sit

§ 119 *a*. A fidejussor, on the other hand, may be accessory to any obligations, whether real, verbal, literal, or consensual, and whether civil or natural. So that he may even be bound for the obligation of a slave either to a stranger or

cui adiciatur; adeo quidem, ut pro seruo quoque obligetur, siue extraneus sit qui a seruo fideiussorem accipi*at*, siue ipse dominus in id quod sibi debeatur.

to his own master; and this is the case whether it is a stranger who accepts a fidejussor for the slave, or whether it is the master himself who does so for a debt due from his slave to him.

§ 120. Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus, et alio iure ciuitas eius utatur. fideiussoris autem etiam heres tenetur. Inst. 3, 20, 2.

§ 120. Again, the heir of the sponsor or fidepromissor is not bound by the guaranty, unless it is the heir of an alien fidepromissor in whose city (civitas) such a rule prevails; but the fidejussor's heir is always bound.

§ 121. Item sponsor et fidepromissor leg*e* Furi*a* biennio liberantur, et quotquot erunt numero eo tempore, quo pecunia peti potest, in tot partes d*i*ducitur inter eos obligatio et singuli ⟨*in*⟩ uiriles partes *obliga*ntur. fideiussores uero perpetuo tenentur, et quotquot erunt numero, singuli in solidum obligantur. itaque liberum est creditori a quo ue*lit so*lidum petere. sed nunc ex epistula diui Hadr*iani conpe*ll*itur* creditor a singulis qui modo soluendo sint par*tes* pet*ere*. eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus soluendo non sit, hoc onus ad ⟨*ceteros non pertinet; sed ex fideiussoribus etsi unus tantum soluendo sit, ad hunc onus*⟩ ceterorum quoque pertinet. Inst. 3, 20, 4.

§ 121. Again, a sponsor and fidepromissor, by the lex Furia, at the end of two years are discharged of obligation, and whatever is the number of these kinds of sureties at the time when payment of the debt is due, the total obligation is divided into as many parts; and each surety is only liable for a single part. Fidejussors, on the other hand, are liable for ever, and, however many of them there are, each is liable for the whole amount of the debt, the creditor being thus entitled to sue whichever he chooses for the whole. But now by the letter of Hadrian of sacred memory he can only recover from each of the fidejussors, who are solvent at the time an aliquot part of the debt. Thus the letter of Hadrian of sacred memory differs from the lex Furia in this respect, that the insolvency of one sponsor or fidepromissor does not increase the liability of the remainder, whereas if only one of several fidejussors is solvent, he has to bear the whole burden.

§ 121 *a*. Sed cum lex Furia tantum in Italia locum habeat, euenit ut in ceter*is* pr*o*uinciis sponsores quoque et fidepromissores proinde ac fideiussores *p*erpetuo teneantur et singuli in solid*um* obligentur, nisi ex

§ 121 *a*. But as the lex Furia only applies to Italy, it follows that in the provinces, sponsors and fidepromissors, like fidejussors, are liable for ever, and each would be liable for the whole amount, unless they are also

epistula diui Hadriani hi quo*que* adiuuen*tur* in parte.

§ 122. Praeterea inter sponsores et fidepromissores lex Appuleia quandam soci*et*atem introduxit. nam si quis horum plus sua portione soluerit, de eo quod amplius dederit aduersus ceteros actiones constituit. quae lex ante legem Furiam lata est, quo tempore in solidum obligabantur. unde quaeritur, an post legem Furiam adhuc legis Appuleiae beneficium supersit. et utique extra Italiam superest. nam lex quidem Furia tantum in Italia ualet, Appuleia uero etiam in ceteris prouinciis. sed an etiam ⟨*in*⟩ *Ita*li*a* beneficium legis Appuleiae supersit, ualde quaeritur. *ad fideiussores autem lex* Appuleia non pertinet. itaque si creditor ab uno totum *con*secutus fuerit, huius sol*i*us detrimentum er*it*, scilicet si is pro quo fideiussit soluendo non sit. *sed ut ex* supra dicti*s* apparet, *is* a quo creditor totum petit poterit ex epistula diui Hadriani desiderare, ut pro parte in se detur actio. Inst. 3, 20, 4.

§ 123. Praeterea lege Cicereia cautum est, ut is, qui sponsores aut fidepromissores accipiat, praedica*t* palam et declaret, et de qua re satis accipiat et quot sponsores a*u*t fidepromissores in eam obligationem accepturus sit; et nisi p*rae*dixerit, pe*r*mitti*tur* sponsoribus et fidep*r*omissoribus intra diem XXX praeiudicium postulare, quo quaeratur, an ex ea lege praedictum sit; et si iudicatum fuerit praedictum n*on* esse, liberantur. qua lege fideiussor*um* menti*o* nulla fit. sed in us*u* est, etiam

partly relieved by the letter of Hadrian.

§ 122. Moreover, between sponsors and fidepromissors the lex Appuleia introduced a sort of partnership, for under this law any one of them who has paid more than his share is given an action to recover the excess from the others. The lex Appuleia was passed before the lex Furia, at a time when each sponsor and fidepromissor was liable for the whole amount; and hence it is questioned whether, since the lex Furia was passed, the benefit of the lex Appuleia still exists. Outside Italy it undoubtedly does; for the lex Furia is only in force in Italy, while the lex Appuleia extends also to the remaining provinces; but whether the benefit of the lex still continues in Italy is much disputed. Fidejussors are not governed by the lex Appuleia; accordingly, if one fidejussor pay the whole amount, he alone suffers by the insolvency of the principal; however, as was said above, a fidejussor sued for the whole amount may by the letter of Hadrian, if he chooses, require the claim to be reduced to his ratable portion.

§ 123. Further, the lex Cicereia provides that a creditor who obtains the guaranty of sponsors and fidepromissors shall previously announce and declare to them the amount of the debt to be guaranteed and the number of sponsors or fidepromissors by whom it is to be guaranteed; and in the absence of such declaration the sponsors or fidepromissors are permitted within thirty days to demand a preliminary trial of the issue (praejudicium), whether the requisite declaration was made; and on judgment that it was not made they are discharged

si fide*i*ussores accipiamus, praedicere.

of liability. The law makes no mention of fidejussors, but it is usual in a guaranty by fidejussors to make a similar declaration.

§ 124. Sed beneficium leg*is* Corn*e*liae o*m*nibus commune est. qua lege id*em* pro eodem apud eundem eodem anno uetatur in ampliorem summam obligari creditae pecuniae quam in XX mili*a*. et quamuis sponsores uel fid*e*promissores in amplam pecuniam, ueluti si sestertium C milium ⟨*se obligauerint, tamen dumtaxat* XX *tenentur*⟩. pecuniam autem creditam dicimus non solum eam, quam credendi causa damus, sed omnem, quam tu*m cum* contrahit*ur* obligatio certum es*t* debitum iri, id est ⟨*quae*⟩ sine ulla condicione deducitur in obligation*em*. itaque et ea pecunia, quam in diem certum dari stipulamur, eodem numero est, quia certum es*t eam* debit*um iri*, licet post tempus petatur. appellatione autem pecuniae omnes res in ea lege significantur. itaque si uinum uel frumentum *aut* si fundum uel hominem stipulemur, haec lex obseruanda est.

§ 124. But the benefit of the lex Cornelia is available for all sureties, which forbids the same person to be surety for the same debtor to the same creditor in the same year for more than twenty thousand sesterces of credita *pecunia*; and if a sponsor or fidepromissor guarantees a larger sum, for instance, one hundred thousand sesterces, he can only be condemned in twenty thousand sesterces. Pecunia credita for purposes of the statute is said to include, besides a present loan, everything which at the time of entering into the suretyship is certain to be due, that is, which depends on no contingency. Accordingly, it includes money stipulated to be paid on a future day; because it is certain that such money will be due, although an action to recover it cannot be brought till a future time. But *pecunia* in this law includes everything, so that, if we stipulate for the conveyance of wine, or corn, or land, or a slave, the lex Cornelia applies.

§ 125. Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, ueluti si dotis nomine, uel eius quod ex testamento tibi debeatur, aut iussu iudicis satis accipiatur. et adhuc lege ⟨*Iulia de*⟩ uicesima hereditatium cauetur, ut ad eas satisdationes, quae ex ea lege proponuntur, lex Cornelia non pertineat.

§ 125. In some circumstances, however, the law permits a surety to be bound for an indefinite amount, as security for dower, for instance, or for that which is due under a will, or by judicial order. Also the lex Julia, imposing a duty of one twentieth on testamentary successions, provides that the securities therein required shall be excepted from the scope of the lex Cornelia.

§ 126. In eo *q*uoque iure par condicio est omnium, sponsorum fidepromissorum fideiussor*um*, quod ita obligari non poss*unt*, u*t* plus debeant, quam debet is

§ 126. The rights of sponsors, fidepromissors, and fidejussors are also equal in respect of the rule that they cannot be bound for more than their principal. They

pro quo obligantur. at ex diuerso ut minus debeant, obligari possunt, sicut in adstipulatoris persona diximus. nam ut adstipulatoris, ita et horum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re. Inst. 3, 20, 5.

may, however, be bound for less, just as the adstipulator may stipulate for less. For their obligation, like that of the adstipulator, is an accessory of the principal obligation, and the accessory cannot be greater than the principal.

§ 127. In eo quoque par omnium causa est, quod si quid pro reo soluerint, eius reciperandi causa habent cum eo mandati iudicium. et hoc amplius sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur depensi. Inst. 3, 20, 6.

§ 127. They further resemble in this, that whoever pays for the principal can recover the amount from him by action of mandate. Sponsors by the lex Publilia have an additional remedy, being able, unless reimbursed in six months, to recover twice the sum advanced by the action on money paid by a sponsor.

§ 110. At the corresponding point of his Institutes (3, 16) Justinian introduces the mention of CORREALITY (et stipulandi et promittendi duo pluresve rei fieri possunt), and it may be expedient to examine the nature of Correality before we embark on the consideration of the various forms of Guaranty.

Correality, the multiplication of creditores (plures rei credendi) or debitores (plures rei debendi) in a single obligation without a corresponding division of the Object of the right or obligation, was an institution of Roman law in favour of creditors; whereby, exceptionally and usually in virtue of a special agreement, each creditor was severally entitled to recover the whole (solidum) object of the obligation from a common debitor, or each debitor was severally liable to pay the whole object of the obligation to a common creditor. The ordinary rule, to which Correality forms an exception, is that when there are many creditores or many debitores in an obligation, the Object of the obligation is correspondingly divided; so that each creditor is only entitled to recover a proportional fraction of the advantage and each debitor is only bound to bear a proportional fraction of the burden. In Correality each creditor is *severally* entitled to receive, and each debtor is *severally* bound to discharge, the whole Object of the obligation. By the ordinary rule, the creditors would be only *jointly* entitled to receive the whole object; and this the debtors would be only *jointly* bound to discharge; each creditor would be *severally* entitled to receive only a ratable part of the Object of the obligation, and a ratable part of the Object is all that each debtor would be *severally* bound to discharge. By

having a number of correal creditores, each entitled to entire performance, a debt could be more readily enforced, e. g. by adstipulatio. By having a number of correal debitores, each liable for entire performance, as if he were sole debitor, a creditor was rendered more secure.

Correality may originate in various modes:

(*a*) Contract, whether Formal or Formless, Dig. 45, 2, 9, in which there are several promisors or several promisees. The usual origin of Correality was Verbal contract or Stipulation.

(*b*) Testament: e. g. when a testator charges several co-heirs alternatively with the payment of a legacy.

(*c*) Noxal liability of co-owners: e. g. when the co-proprietors of a slave are liable for a noxal action for some mischief that he has committed.

(*d*) The relation of filiusfamilias to paterfamilias, or of free agent to principal, when the superior (father, or principal) is liable to an actio adjecticiae qualitatis (actio de peculio, de in rem verso, quod jussu, institoria, exercitoria, 4 § 69) for the obligation of the inferior (son, or agent), the inferior himself being directly liable, and the creditor can elect which he will sue.

Correality not only as denoting total or integral liability on the part of the debitor, and total or integral claim on the part of the creditor, furnishes a contrast to partial or fractional (in partem, pro rata) liability or claim; but must also be distinguished from another relation of co-debtors and co-creditors to which it is much more nearly akin, namely Solidarity. Correality and Solidarity agree in this, that in both of them every creditor is severally entitled to receive entire performance of the obligation, and every debitor is bound to discharge the entire liability: but differ in this, that whereas Correality implies the unity or identity of the obligation by which the co-creditors are entitled or the co-debtors are bound; Solidarity implies that they are entitled or bound by a plurality or diversity of obligations.

Solidarity originates in various modes:

(*a*) Common delict, or other unlawful act, when several co-delinquents incur a liability to indemnification.

(*b*) Co-guardianship, when one of the co-guardians has injured the ward by his negligence.

(*c*) Some kinds of contract in which there are several promisors but no special agreement to create Correality; e. g. where there are joint borrowers, hirers, agents, depositaries.

(*d*) Guaranty by the form of mandate called Mandatum qualificatum, §§ 155–162, comm.; or arising from a simple promise to pay the debt of another, called Constitutum debiti alieni, which, though originally a mere pact, came to be enforced by the praetor.

Both Correality and Solidarity, as implying liability for entire but alternative performance, lie in the mean between two extremes: on the one side, divided or partial (pro rata) liability; and on the other side, the multiple or cumulative liability, generated by delicts that give rise to actions for penalties. E. g. if several persons combine to commit a theft they are all severally liable to the actio furti for the whole penalty, and payment by one does not discharge his fellow delinquents: or if a person is guilty of an outrage (injuria) which wounds the honour of several, they are all creditors for the penalty, and recovery by one does not extinguish the claims of the rest, 3 § 221. Where the actions on account of an illegal act are purely indemnificatory, as the actions brought on account of theft for damages—condictio furtiva—or on account of Metus, Dolus, Noxa, Vis, there, as we have already stated, the relation of Solidarity subsists between the co-delinquents, and satisfaction by one extinguishes the obligation of the rest.

The differences between Correality and Solidarity are principally two:

1. In Correality the right of action against the remaining codebtors or by the remaining co-creditors was extinguished by joinder of issue in an action (litis contestatio) against or by one of the parties: in Solidarity the right of action was only extinguished by complete payment or satisfaction (solutio). Electo reo principali fidejussor vel heres ejus liberatur: non idem in mandatoribus observatur, Paulus 2, 17, 16.

It was possible to avoid the consumption or extinction of the right of action against the surety that was operated by suing the principal by so shaping the stipulatio of fidejussio as not to produce Correality, Dig. 45, 1, 116. But at a later period the extinction of right to sue by litis contestatio was abandoned: and Justinian expressly enacted that in Correality as well as in Solidarity only actual satisfaction of a claim should operate a consumption of the right of action. Justinian's ordinance is introduced into the Digest by means of a bold interpolation: Cum utro velit Seius aget, ut, si cum uno actum sit *et solutum*, alter liberetur. Pomponius, Dig. 30, 1, 8, 1; Cod. 8, 40, 28.

2. A second difference between Correality and Solidarity consists in the fact that in Solidarity the guarantor who pays the whole has regressus against his co-guarantors, that is to say, has a power of recovering from them contribution of their share of the debt: whereas the Correal debtor who pays has no regressus or right to contribution. (I have here followed Vangerow: Savigny attempts to prove, but apparently without success, that regressus is an incident of Correality.) Where, however, the Solidarity is the effect of co-delinquency (No. *a.* above) the delinquent who pays has no

regressus. Another important characteristic of a Correal obligation is that formal discharge (acceptilatio) by one of the Correal creditors entirely extinguishes the Correal debt so that none of the other Correi can sue for it. Cf. § 215. (On the subject of Correality and Solidarity and for an account of the literature relating to these joint and several forms of obligation, see Sohm, § 74.)

After this preliminary consideration of the nature of Correality we are in a position to examine the nature of Guaranty or Suretyship, and to fix the relation of fidejussio, one of the latest developments of Suretyship, to other cognate institutions of Roman jurisprudence.

Fidejussio is a species of INTERCESSIO; and accordingly the abovementioned object requires us to examine the nature and subdivisions of Intercessio.

Intercession is the assumption of liability for the debt of another person by contract with his creditor. For instance, when a person is hesitating whether he shall accept an inheritance because he has doubts whether it is solvent, that is, whether the assets exceed the liabilities, to induce him to accept it by a general promise of indemnification is not Intercession, because here there is no contract with a creditor on account of a debt owed to him by a third party: but if the ground of his hesitation is a suspicion that the debtors to the inheritance are insolvent, to induce him to accept the inheritance by a promise to make good what he fails to recover from the debtors is Intercession, for here is a contract with a creditor on account of the debt of a third party.

Intercession is either (A) Privative or (B) Cumulative.

A. Privative Intercession is the substitution of one obligation for another.

(1) Substitution for an actually pre-existent debt involves NOVATION, i. e. the extinction of such preceding debt, and is generally called by civilians EXPROMISSIO, though the term is not merely used in our sources in this restricted sense. Cf. Roby, 2, p. 49, n. 1. Expromission, the discharge of a debtor by taking his place in relation to the creditor, may be considered as including Defensio, the defence of an absent debtor in a suit instituted by the creditor; for then the volunteer defendant becomes liable to condemnation in place of the original debtor: Suscipit enim in se alienam obligationem, quippe cum ex hac re subeat condemnationem, Dig. 16, 1, 2, 5, Ad senatusconsultum Velleianum.

(2) Substitution, not for an actually pre-existent obligation which is novated, but for an obligation which would have to be incurred by another person if the present obligation were not assumed, is called INTERVENTIO. Si, quum essem tecum contracturus, mulier intervenerit ut cum ipsa potius contraham, videtur intercessisse, Dig. 16, 1, 8, 14.

B. Cumulative Intercession, or the addition of an obligation to an obligation, is either Partial or Total, according as either part or the whole of the object of the first obligation is the object of the second or additional obligation.

(3) Of Partial intercessors we find an example within the limits of Italy, in SPONSORS and Fidepromissors under the operation of the lex Furia. By this law the liability of each sponsor was in inverse ratio to their number, § 121. Whether an Italian Sponsor who had not availed himself of the limitation of his liability under the lex Furia was entitled to Regressus under the older lex Appuleia, was a matter of controversy, ibid.

Total Intercession is divided, according as several debtors are bound by one single obligation or several distinct, though similar, obligations, into two classes, Correality and Solidarity, terms which have been explained above.

Correality is subdivided into two classes, according as all the debitores are equally principals and originally interested, or some are principal and others only subsidiary or accessory. But in respect of the right of suing or liability to be sued, the accessory, e. g. the fidejussor before the beneficium excussionis or ordinis was allowed him, may be in the same position as the principal.

Correality in which all the debtors are interested as principals has no specific name. As Intercession has been defined to be the assumption of an alien debt (aliena obligatio), this Correality is not a species of Intercession.

(4) Correality in which one debtor is principal and others are accessory is instanced in FIDEJUSSIO. There is not only Correality between the principal and each Fidejussor, but also between the several Fidejussors. This is denied by Savigny, Law of Obligations, § 25, who asserts that though there is Correality between the principal and each Fidejussor there is none between the several Fidejussors: but Vangerow truly observes, § 573, that if the obligation of each Fidejussor is identical with the obligation of the principal it follows, by the fundamental axiom of syllogism, that the obligations of the several Fidejussors are identical with one another: in other words, that there is Correality between the several Fidejussors. Fidejussors have Beneficium divisionis by the epistle of Hadrian, § 121, Beneficium excussionis by Novella 4 of Justinian, and Beneficium cedendarum actionum. If he neglected to avail himself of these, a Fidejussor, like other correal debtors, had no regressus against his co-fidejussors, Dig. 46, 1, 39.

Correality is again instanced in the Sponsors and Fidepromissors of the provinces external to Italy under the operation of the lex Appuleia. Unlike other correal debtors they had by this statute

Regressus by means of an action analogous to that between partners, § 122; though like Fidejussors, they also had Beneficium divisionis under the constitution of Hadrian, § 121.

(5) Solidary Intercession is exemplified by the Mandator in the contract called MANDATUM QUALIFICATUM. Here a lender gives credit to a borrower in reliance on the representations of the mandator, § 156, who thus is a guarantor of the borrower's solvency: when there are several such guarantors, their liability is solidary.

(6) Other Solidary Intercessors are those informally undertaking to pay the debt of another in CONSTITUTUM DEBITI ALIENI. Both the Mandator and the Constituens have Beneficium divisionis, Cod. 4, 18, 3, and Beneficium excussionis, Novella 4.

§ 114. The peculiarity of the rules respecting the adstipulator arises from the fact that he was a mandatary, agent, or trustee, the repositary of a special personal confidence. Hence his rights did not pass to his heres nor to his paterfamilias. Ordinary rules, however, obtained so far, that he could not sue so long as he remained a filiusfamilias, nor after his rights had been extinguished by a capitis diminutio.

The principal function of the Adstipulator and one function of the Adpromissor (the chief function of the latter of course was suretyship) seems to have been to maintain or defend the action on behalf of the principal, i.e. the representation of the principal as plaintiff or defendant in a suit at a period when the doctrine of Agency was still undeveloped.

We must suppose a time when the Cognitor and Procurator, whose appointment as described, 4 § 83, was such a simple matter, were institutions not yet invented, which was the case in the period of Statute-process (legis actio), concerning which we are told: Nemo alieno nomine lege agere potest, Dig. 50, 17, 123; and when, nevertheless, circumstances often prevented a principal from litigating in person. In questions relating to ownership he might in early times get over the difficulty and practically employ an agent by fiduciary mancipation of the property in dispute to a third person, who would then litigate with the adversary in the rights of his auctor, or the person from whom he deduced his title. But in questions of Obligation this course was not open, for Obligation was not thus transferable. Novation might effect the purpose, 2 § 38: but Novation required the concurrence of the debtor or adversary: and Cession or Procuration, 2 § 39, we have assumed to be as yet uninvented. At this period, then, the only remaining available representative in a suit concerning contractual obligation was a person who had been concerned, though merely as an accessory, § 126, in the original obligation. Ihering, § 56. When the development of the law of mandate

led to the frequent appointment of a procurator, the adstipulator ceased to be necessary except for securing performance of an act after the death of the principal promisee, § 117. He ceased to be necessary even for this purpose when a stipulation for an act after the death of the stipulant was decided to be valid, and accordingly the adstipulator has disappeared from the legislation of Justinian.

§ 115. The adpromissor at different epochs of the law appears as sponsor, fidepromissor, fidejussor. A sponsor could only intervene when both parties were Roman citizens, a fidepromissor was used when either party was a peregrinus, § 120. There is a striking parallelism between the rules relating to a sponsor or fidepromissor and those relating to an adstipulator. The obligation does not pass to the heres, and the sponsor and fidepromissor can only be adjuncts to a stipulation, the fidejussor may be employed to guarantee any obligation. The stipulation of the sponsor or fidepromissor may be valid when the stipulation of the principal, though creating naturalis obligatio, is invalid civiliter.

§ 121. The lex Furia discharging the sponsor and fidepromissor of liability in two years and limiting the liability of each to a proportionate part, is supposed to have been enacted B.C. 95.

The epistle of Hadrian (A.D. 117–138) left the fidejussor liable originally (ipso jure) to the whole debt, with a counteractive right (exceptio) to call on the other solvent sureties to pay their share of the debt, enforced by a clause in the formula, of which the following passage appears to give the terms: Si contendat fidejussor caeteros solvendo esse, etiam exceptionem ei dandam: Si non et illi solvendo sint, Dig. 46, 1, 28. 'The contention of a fidejussor that his co-fidejussors are solvent may be expressed in an exception: Unless such and such co-guarantors are solvent.' This privilege of the fidejussor is called Beneficium divisionis.

§ 122. The lex Appuleia, which gave the sponsor or fidepromissor an action analogous to that between partners, whereby he could recover by contribution from his co-sureties whatever he had paid in excess of his proportionate share, was passed B.C. 102. It was the rule of the provinces as the lex Furia was the rule of Italy.

§ 123. The name of this law, lex Cicereia, was first discovered by Studemund. Its date is not known, but as we gather from the text it was passed at a time when fidejussors were not yet instituted.

§ 124. The lex Cornelia, the first which mentions the fidejussor as well as the sponsor and fidepromissor, limiting the amount for which the same guarantor could be bound as security for a contract either of mutuum or of stipulatio in the same year for the same principal in the same stipulation, was passed in the dictatorship of Sylla, B.C. 81, and seems to show that the stringency of the lex Furia had

led to the employment of the fidejussor in preference to the sponsor and fidepromissor. The sponsor and fidepromissor have vanished from the legislation of Justinian.

§ 125. The lex Julia vicesima or vicesimaria was a law of Augustus, A.D. 6, imposing, in support of the military treasury, a succession duty of one twentieth of the value on all inheritances and legacies acquired by Roman citizens. Certain exemptions from the tax were allowed. It was with the object of increasing the revenue arising from this source that Caracalla extended Roman citizenship to all free inhabitants of the Empire (Roby, 2, p. 32, n. 2).

§ 127. The lex Publilia, which enabled a sponsor who had paid the debt of his principal, unless reimbursed within six months, to recover by actio depensi, a form of manus injectio pro judicato (4 § 22), twice the amount of the original debt, is of uncertain date.

The right of a fidejussor to require an assignment from the creditor of his rights of action is called Beneficium cedendarum actionum. If he neglected to avail himself of it and of his Beneficium divisionis, he had, when sued, no Regressus, that is no means of making his co-sureties share the liability with him, Dig. 46, 1, 39.

A surety or guarantor of a debt may require the creditor to proceed against the principal first, provided he was solvent and in a position to be sued. But this change in the law, which is called Beneficium excussionis, or ordinis, was not made till a late period, being introduced by Justinian, Novella 4.

In Correality, as has been remarked above, the right of action against remaining co-debtors was extinguished by the joinder of issue in a suit against one of them (litis contestatio). This power of litis contestatio to extinguish the creditor's right of action when there was a relation of Correality between a number of debtors was doubtless a motive leading to the substituting for Fidejussio other forms of guaranty involving Solidarity instead of Correality, and consequently free from extinction of right of action by mere litis contestatio. Such forms were Mandatum qualificatum (§§ 155–162, comm.) and Constitutum debiti alieni. At a later period litis contestatio had not this effect, as, in respect of Fidejussio, was expressly declared by Justinian, Cod. 8, 40, 28.

The general name of a stipulation by way of security for a debt is cautio, 2 § 253. If the debtor alone was bound, it was called nuda repromissio. If sureties were also bound, it was called satisdatio or satisacceptio.

Before quitting the subject of suretyship we must observe a peculiar feature of Roman law, the incapacity of women to become surety—or intercede in any way for any one. This restriction, which had been recognized to some extent by previous law, was

established by the senatusconsultum Vellaeanum passed in the reign of Claudius, A.D. 46, and by the subsequent interpretation of that enactment.

The senatusconsultum does not declare any proceeding which is contrary to it to be void, but directs the magistrate, if an action is brought, to see that the will of the senate is given effect to, which he did by allowing a woman to plead the exceptio, S. C. Vellaeani, Dig. 16, 1; 4 §§ 115–137, comm.

The most noticeable rule of English law respecting the contract of guaranty is that it must be in writing. No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, Statute of Frauds, 29 Charles II, sect. 4.

§ 128. Litteris obligatio fit ueluti *nominibus* transscripticiis. fit *autem* nomen transscripticium duplici modo, uel a re in personam uel a p*er*sona in person*am*.

§ 128. Literal contracts, or obligations created by writing, are made by transcriptive entries of debit or credit in a journal. Transcriptive entries are of two kinds, either from thing to person or from person to person.

§ 129. ⟨*A re in personam trans*⟩scriptio fit, ueluti si id quod *tu* ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero.

§ 129. Transcription from thing to person is made when the sum which you owe me on a contract of sale or letting or partnership is debited to you in my journal as if you had received it as a loan.

§ 130. A persona in person*am* transscriptio fit, ueluti si id quod mihi Titius debet tibi id expensum tulero, id est si Titius *te* delegauerit mihi.

§ 130. Of transcription from person to person we have an example when the sum which Titius owes me is entered in my journal as debited to you, assuming that you are indebted to Titius and that Titius has substituted me for himself as your creditor.

§ 131. Alia causa est eorum nominum quae arcaria uocantur. in his enim re*i*, non litterarum obligatio consistit, qui*p*pe non aliter uale*nt* quam si numerata sit pecunia; numeratio autem pecuniae *re* facit obligationem. qu*a* de causa recte dicemus arcaria nomina

§ 131. Transcriptive entries differ from mere entries of a person as debtor to cash; here the obligation is not Literal but Real, for it is invalid unless money has been actually paid, and payment of money constitutes a Real obligation. Consequently the entry of a person as

nullam facere obligationem, sed obligationis factae testimonium praebere.

§ 132. Vnde ⟨*non*⟩ proprie dici*tur* arcariis nominibus etiam peregrinos obligari, quia non ipso nom*in*e sed n*u*m*e*ratione *p*ecuniae obligantur; quod genus obligationis iuris gentium est.

§ 133. Tr*an*sscripticiis uero nominibus an ob*l*igentur peregrini merito quaeri*tur*, quia quodammodo iuris ciuilis est talis obligatio; quod Neruae placuit. Sabino autem et Cassio uisum est, si a re in personam fiat nomen transscripticium, etiam peregrinos obligari; si uero a persona in personam, non obligari.

§ 134. Praeterea litterarum obligatio fieri uidetur chirographis et syngraphis, id est si quis debere se aut daturum s*e* scribat; ita scilice*t* si eo nomine stipulatio non fiat. quod genus obligationis proprium peregrinorum est.

debtor to cash does not constitute an obligation, but is evidence of an obligation.

§ 132. Accordingly, it is not correct to say that debits to cash (arcaria nomina) bind aliens as well as citizens, because it is not the entry in the journal but the payment of money that constitutes the contract, a mode of obligation which belongs to jus gentium.

§ 133. Whether transcriptive debits form a contract binding on aliens has been doubted with some reason, for this contract is an institution of civil law, as Nerva held. Sabinus and Cassius, however, held that transcription from thing to person forms a contract binding on an alien, though not transcription from person to person.

§ 134. Another Literal obligation is that created by chirographa and syngraphae, or written acknowledgments of debt or promises to pay, unaccompanied by stipulation. This mode of contract is proper to aliens.

One of the account-books kept by the Romans, a nation of book-keepers, was a waste or day book, called Adversaria, into which all transactions were at once entered as they occurred. At the end of each month the contents of the Adversaria were posted into the more formal journal, the Tabulae, or Codex accepti et expensi. According to Dionysius of Halicarnassus every Roman had to take an oath once in five years before the Censors that his book-keeping was honest and accurate. (On the subject of Roman book-keeping and the literal contract, see Roby, Bk. V, Appendix A; Muirhead, Roman Law, 258; Sohm, p. 410, and the literature referred to by these writers.)

One, if not the only, species of Literal obligation, namely Expensilation, in the nature of a novation or transformation of a pre-existing debt into one of a stricter form, was effected by an entry in these domestic registers, and from Cicero, Pro Roscio Comoedo, c. 5, we may infer that the entry was binding even though it had not

been transferred from the Adversaria to the Codex. The creditor, apparently, with the consent and by the order of the debtor, debited the latter with a certain sum in the books of the creditor (expensilatio). Afterwards a corresponding entry was made by the debtor in the books of the debtor (acceptilatio). The literal contract, however, appears to have been complete without the latter entry.

Apparently, the true contract was the entry in the creditor's book. The consent (jussus) of the debtor to this entry was necessary, but not restricted to any particular form. The entry in the debtor's book was evidence, but not the only admissible evidence, that he had assented to the entry in the creditor's book.

Theophilus, in his Greek version of the Institutes, gives the following account of the process: *ἡ δὲ* literis [*ἐνοχὴ*] *ἐστὶ τὸ παλαιὸν χρέος εἰς καινὸν δάνειον μετασχηματιζόμενον ῥήμασι καὶ γράμμασι τυπικοῖς. . . . ἦν δὲ ταῦτα τὰ ῥήματα, ἅτινα καὶ ἐλέγετο καὶ ἐγράφετο· τοὺς ἑκατὸν χρυσοῦς, οὓς ἐμοὶ ἐξ αἰτίας μισθώσεως χρεωστεῖς, σὺ ἐκ συνθήκης καὶ ὁμολογίας δώσεις τῶν οἰκείων γραμμάτων; εἶτα ἐνεγράφετο, ὡς ἀπὸ τοῦ ἐνόχου ἤδη γενομένου ἐκ τῆς μισθώσεως, ταῦτα τὰ ῥήματα· Ἐκ τῆς συνθήκης ὀφείλω τῶν οἰκείων γραμμάτων. Καὶ ἡ μὲν προτέρα ἐνοχὴ ἀπεσβέννυτο, καινοτέρα δὲ ἐτίκτετο*, Theophilus, 3, 21. 'A literal obligation was an old debt transformed into a new loan by certain solemn words and writings. The words which were spoken and written in the register were as follows: "The hundred aurei, which you owe me on account of rent, will you pay me on the convention and acknowledgment of your own journal?" Then followed, as if written by the person indebted for rent, these words: "I owe you that sum by the admission of my own journal." Whereby the pre-existing obligation was extinguished and a new one created.' [From the mention of 'solemn words' Theophilus is supposed to have confounded Expensilatio, which was independent of spoken words, with Stipulatio accompanied by a written record or CAUTIO.]

The account of Theophilus clearly only applies to one form of expensilation, the transscriptio a re in personam. The use of this kind of transscriptio is obvious: it was a mode of converting Formless contracts into Formal contracts—equitable obligations into civil obligations: of metamorphosing claims recoverable by actions ex bona fide, e.g. conducti locati, empti venditi, which in many points favoured the defendant, into debts recoverable by the short and sharp remedy of the civil action of Condictio, which, when brought for certa pecunia credita, was the more formidable to a dishonest litigant, as it was accompanied by sponsio poenalis, whereby the vanquished party forfeited a third of the sum in litigation, in addition, if he was the defendant, to the original claim, 4 § 171.

A narrative of Cicero shows the employment and possible mis-

employment of this transscriptio. He relates how a purchaser was defrauded by a vendor, and in consequence of the form of contract had no redress. Stomachari Canius. Sed quid faceret? Nondum enim Aquilius collega et familiaris meus protulerat de dolo malo formulas, De Off. 3, 14. 'The purchaser was indignant, but he was helpless, for my colleague Aquilius had not then invented the action of Fraud.' It may occur to us, on hearing the story, that as the actio Empti was an action ex bona fide, that is, one in which the judex was empowered to consider allegations of bad faith, the defrauded purchaser would not have been without a remedy. But, as Savigny points out, Cicero had guarded against this objection by a certain feature which he gives to the narrative. Emit homo cupidus et locuples tanti quanti Pythius voluit, et emit instructos. *Nomina facit*, negotium conficit. 'The purchaser was eager and rich, he bought at the price the seller named, and he bought the gardens ready furnished. The contract is by expensilatio; the business is concluded.' Nomen, which sometimes signifies any debt, is here used, in a specific sense, for a debt created by Literal contract; accordingly, nomina facit implies that the purchase, as soon as concluded, had been novated, § 176, i. e. extinguished by metamorphosis into a ledger debt; so that the transaction was removed from the domain of equity to that of civil law, which in its primitive simplicity had no provision for dolus malus.

Transscriptio a persona in personam was the substitution or exchange of a debt owed by C to B, in discharge of a debt owed by B to A; or, at all events, the substitution of C in lieu of B as debtor to A. Transscriptio would thus afford a ready means of transferring obligations from one person to another, especially when the parties were at a distance. It is impossible to form an exact conception of the mode in which these transcriptions were operated without a greater knowledge than we possess of the Roman method of book-keeping. Nomen facere, as we have just stated, is to contract a debt by literal obligation. Nomen signifies the name of the debtor, as in the line of Horace: Scriptos nominibus certis expendere nummos; 'Recorded on his ledger to lend moneys to solvent borrowers.' In the business of bankers (argentarii), whose book-keeping of course was extremely regular, the Literal contract appears to have survived when it had fallen into desuetude in other quarters.

The word Transscripticia may refer to the *transfer* involved in Novation: Savigny, however, prefers the following origin of the term. The Roman account-book (tabulae accepti et expensi), he supposes, was essentially a Cash-book; a record of incomings and outgoings of actual cash: i. e. the monthly or annual balance of the debits and credits ought to correspond with and explain the

metallic contents of the cash-box or arca at the end of the month or year. This correspondence or agreement would be destroyed by the introduction of Fictitious loans (expensilatio) into the accounts, unless every such entry to the credit of the cashier or chest was neutralized and cancelled by a *cross* or opposite entry, of an equally fictitious character, to the debit of the chest or cashier. But if this device was adopted the balance of the book would coincide with the actual contents of the chest; and the fictitious entries would be called Transscripticia because they were always double: because each was always accompanied by its shadow *across* the page. Verm. Schriften, 1, 205, &c.

In the time of Justinian both of the modes of Expensilatio, properly confined to Roman citizens, though the Sabinians were inclined to extend it in one form to aliens, § 133, had become obsolete; as also another form of Literal contract, the Syngrapha or Chirographum, available where the parties were aliens. Syngrapha and Chirographum, apparently, are synonymous, and signify a written acknowledgment of a debt, such contract in Greece being always ground to support an action, whatever its subject or form. In the Corpus Juris the term Chirographum generally signifies a cautio or a document which is evidence of the existence or discharge of a debt, and the term Syngrapha occurs in the Greek Novellae of Justinian in the same sense; cf. Sohm, p. 414, n. 3.

The desuetude of Nomina transscripticia was probably due, not simply to the fact that the Roman system of book-keeping was strange in the east, but also to the invention of CONSTITUTUM, a praetorian pact (pactum vestitum), which instead of converting, like Expensilatio, an obligation bonae fidei into an obligation stricti juris, superadded an actionable obligation to a previous obligation, whether natural or civil [Ubi quis pro alio constituit se soluturum, adhuc is pro quo constituit obligatus manet, Dig. 13, 5, 28, Inst. 4, 6, 9]; and which with its excessively penal sponsio, 4 § 171, gave the creditor even a more effective remedy than the action on Expensilatio (Condictio for pecunia certa credita).

Arcarium nomen was the record, not of a fictitious loan, like nomen transscripticium, but of the counting out of money from the cash-box (arca), that is, of a genuine loan, and was, accordingly, simply a memorandum of a Real obligation.

The coexistence of Nomina Arcaria with Nomina Transscripticia shows that entry in a Ledger did not operate a novation and convert a debt into a ledger debt, unless the transcriptive entry represented a fictitious, not an actual, loan.

A stipulatio, unlike the entry in the journal or ledger of an actual loan (nomina arcaria), was not an invariable accompaniment of an

advance of money (mutui datio, annumeratio); and, when it was employed simultaneously with annumeratio, unlike nomina arcaria, it always constituted the contract: there were not two contracts, a Real contract and a Verbal contract, but only a Verbal contract, and this without the intervention of Novation, Dig. 46, 2, 6, 1, and Dig. 46, 2, 7. Nam quotiens pecuniam mutuam dantes eandem stipulamur, non duae obligationes nascuntur sed una verborum, Dig. 45, 1, 126, 2. 'An advance accompanied by Stipulation does not produce two contracts, but one, a Verbal contract.'

CONSENSV OBLIGATIONES.

§ 135. Consensu fiunt obligationes in emptionibus uenditionibus, locationibus conductionibus, societatibus, mandatis. Inst. 3, 22, pr.

§ 135. Simple consent creates a contract in purchase and sale, letting and hiring, partnership, agency.

§ 136. Ideo autem *istis* modis consensu dicimus obligationes contrahi, qu*ia* neque uerborum neque scripturae ulla proprietas desiderat*ur*, sed sufficit eos qui negotium gerunt consensisse. unde inter absentes quoque talia negotia contrahuntur, ueluti per epistulam aut per internuntium; cum alioquin uerborum obligatio inter absentes fieri non possit. Inst. 3, 22, 1.

§ 136. In these contracts consent is said to create the obligation, because no form of words or of writing is required, but the mere consent of the parties is sufficient. Absent parties, therefore, can form these contracts; as, by letter or messenger; whereas Verbal obligations cannot be contracted between absent parties.

§ 137. Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet; cum alioquin in uerborum obligationibus alius stipuletur, alius promittat, et in nominibus alius expensum ferendo oblige*t*, alius obligetur. Inst. 3, 23, 3.

§ 137. Further, these contracts are bilateral and bonae fidei, that is, both parties incur a reciprocal obligation to perform whatever is fair and equal; whereas Verbal and Literal contracts are unilateral, that is, one party stipulates and the other promises, or one party makes an entry of the other's debit, and the other party is bound thereby.

§ [138]. [Sed absenti expensum ferri potest, etsi uerborum obligatio cum absente contrahi non possit.]

§ 138. But absence is no impediment to Literal contracts, though it is to Verbal.

Besides the four Consensual contracts which are named in the text, certain praetorian and statutory agreements, though not denominated contracts, became enforceable by action. The most important praetorian pact, or pacts enforced by the praetor, is con-

stitutum or constituta pecunia, which we mentioned when treating of stipulation, as a form of guaranty, Inst. 4, 6, 9. An instance of statutory pact, or pact made valid by statute under Justinian, is donatio inter vivos. A mere promise to give was irrevocable, and the donor could be forced by action to perform his promise, but if above 500 solidi it required public registration.

§ 139. *Emptio et uenditio contrahitur*, cum de pretio conuenerit, quamuis nondum pretium numeratum sit, ac ne arra quidem data fuerit; nam quod arrae nomine datur, argumentum est emptionis et uenditionis contractae. Inst. 3, 23, pr.

§ 139. The contract of purchase and sale is complete so soon as the price is agreed upon and before the price or any earnest money is paid. The earnest money is merely evidence of the completion of the contract.

§ 140. Pretium autem certum esse debet. nam alioquin si ita inter nos conuenerit, ut quanti Titius rem aestimauerit, tanti sit empta, Labeo negauit ullam uim hoc negotium habere; cuius opinionem Cassius probat. Ofilius et eam emptionem et uenditionem; cuius opinionem Proculus secutus est.
Inst. 3, 23, 1.

§ 140. The price must be certain. If there is an agreement to purchase at a price to be fixed by another person, as say by Titius, Labeo, whose opinion is approved of by Cassius, says the contract is invalid, Ofilius says it is a sale, and his opinion is followed by Proculus.

§ 141. Item pretium in numerata pecunia consistere debet. *nam* in ceteris rebus an pretium esse possit, ueluti homo aut toga aut fundus alterius rei ⟨*pretium esse possit*⟩, ualde quaeri*tur*. nostri praeceptores putant etiam in alia re posse consistere pretium. unde illud est, quod uulgo putant per permutationem rerum emptionem et uenditionem contrahi, eamque speciem emptionis uenditionisque uetustissimam esse; argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ait:

⟨ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἴθωνι σιδήρῳ,

§ 141. The price should be in money, for it is much disputed whether anything but money, such as a slave, a robe, a piece of land, can be treated as price. My school hold the affirmative, and regard exchange as a species, and the oldest species, of purchase and sale; in support of which they quote the lines of Homer:

'Here touched Achaean barks in quest of wine.
They purchased it with copper and with steel,
With hides, with horned cattle, and with slaves.'

The other school maintain the negative, and distinguish between exchange and purchase and sale, because in exchange we cannot determine which is the thing

ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσιν,
ἄλλοι δ' ἀνδραπόδεσσι.⟩
diuersae scholae auctores dissentiunt aliudque esse existimant permutationem rerum, aliud *emp*tionem et uenditionem; alioqu*i*n *non posse* rem expediri permutatis rebus, quae uideatur res uenisse et quae pretii nomine dat*a* esse, sed rursus utramque rem uideri et uenisse et utramque pretii nomine datam esse absurdum uideri. sed ait Caelius Sabinus, si rem tibi uenalem habenti, ueluti fundum, [acceperim et] pretii nomine hominem forte dederim, fundum quidem uideri uenisse, hominem autem pretii nomine datum esse, ut fundus acciperetur. Inst. 3, 23, 2.

sold and which is the price, and both things cannot be regarded as both the thing sold and the price. Caelius Sabinus says that if Titius offers, say, land for sale, and I give him a slave for it, the thing sold is the land and the price is the slave [because the preceding offer determines which object is res and which is pretium].

It is necessary to distinguish clearly between the completion of a contract of sale and the subsequent transfer of ownership; between the creation of a jus in personam and the conveyance of a jus in rem; between the acquisition of an obligation and the acquisition of ownership.

The contract is complete and so binding as soon as the object of sale and the price are agreed upon, but no property passes until the price is paid and the thing is either mancipated or possession is delivered, or, in the case of a sale on credit, until possession is delivered, Dig. 18, 1, 19. 'Sale and delivery do not pass property unless the price is paid, or security is given for the price, or credit is given without security,' Inst. 2, 1, 41. 'Sale and delivery do not pass property, unless the vendee pays the price, or gives the vendor security; for instance, by a guarantor discharging the vendee, or by mortgage. If, however, the sale is on credit, ownership immediately passes.'

By English law, if the contract is for the unconditional sale of SPECIFIC goods, ready for delivery, and the price is ascertained, the property in the goods passes to the buyer at the moment that the contract is complete. But, unless it is a sale on credit, the buyer cannot demand delivery of the goods until he has paid or tendered the price. For if the sale is for ready money, delivery or tender of the whole of the goods and price are concurrent conditions (i. e. the seller

must be ready and willing to give possession of the goods in exchange for the price, and the buyer to pay the price in exchange for possession of the goods, as was the case also according to Roman law).

If the contract is not for the purchase of *specific* goods, but of goods of a certain nature or class, only rights in personam arise from the agreement; for, though the contract is complete, no property passes until the particular goods are ascertained by delivery, or appropriated to the contract by the parties.

In the sale of land the equitable estate is conveyed by the contract to convey, when perfected by the payment of the purchase-money, and without notice to the party in whom the legal estate is vested: the legal estate is only passed by the subsequent deed. Formerly the deed was a Feoffment which was inoperative without livery of seisin, that is, delivery of possession; but now the deed of Grant passes property without delivery of possession. The assignment of an equitable interest in personal estate is not perfect, as against an assignee for valuable consideration, without notice to the trustee.

By the Code Napoleon delivery is requisite for the transfer of property in movables, but property in immovables, under French law, is transferred as soon as the contract is complete and the title to it is registered.

By Roman law, the goods are at the risk of the purchaser as soon as the contract is complete, and before the property is transferred. The formula, res perit domino, therefore, does not apply to the contract of purchase and sale, as it does to other contracts, e.g. to mutuum, commodatum, pignus.

In English law, the risk always belongs to the person in whom the property resides, and the maxim, res perit domino, is applicable to sales.

§ 139. Arra, as a general rule, was evidence of the completion of contract, but not always, at least in the time of Justinian. If the parties so agreed, arra was only a penal sum, whose forfeiture entitled either negotiator to recede from a negotiation or rescind a completed contract, Cod. 4, 21, 17. In the absence of such special agreement, in default of voluntary performance, performance could be enforced by action, and forfeiture of the arra was cumulative upon and additional to such performance: the vendee, if he was in default, could not reckon the arra as part of the purchase-money; and the vendor, if in default, besides delivery of possession and repayment of the arra, was compelled to pay an equal sum to the vendee. (Cf. Moyle, Contract of Sale in Roman law, pp. 42, 48.)

§ 140. Where the price is left to be fixed by an arbitrator, Justinian enacted, in conformity with the opinion of Proculus, that the contract is binding if the arbitrator makes his valuation.

§ 141. After the time of Gaius, a constitution of Diocletian and Maximian (A. D. 286–305), conformably to the opinion of Proculus, declares exchange or barter to be a contract, requiring delivery of a thing to make it enforceable, Cod. 4, 64, 3. 'An agreement to exchange without part execution cannot support an action.' Accordingly, we have mentioned it as belonging to the miscellaneous class of contractus innominati.

The obligation of the vendor was not to transfer quiritarian ownership (ut rem emptoris faciat), but merely to secure the vendee in undisturbed enjoyment (ut praestet habere licere) of the article sold, that is, to give him vacant possession and guarantee him against eviction. Accordingly, if the vendee is judicially molested in his possession, he summons his vendor to defend his title, and, if evicted, recovers against his vendor the loss he has sustained. Venditor si ejus rei quam vendiderit dominus non sit, pretio accepto, auctoritati manebit obnoxius, Paul. Sent. rec. 2, 17, 1., 'A vendor, not owner, on receipt of the purchase-money is liable as warrantor.' Auctoritas est actio pro evictione, Dig. 21, 2, 76. 'Auctoritas is an action on eviction against the vendor.'

A sale was often accompanied by stipulations binding the vendor to repay twice the purchase-money in case of eviction, or in case the article sold was returned for unsoundness (duplae stipulatio). English law implies a condition that the seller of goods has a right to sell and a warranty that the buyer shall have quiet enjoyment, but except in certain circumstances refuses to assume an implied warranty of the goods or soundness of the articles sold, applying the maxim caveat emptor. But by Roman law, in the absence of such stipulations, warranty of the title and quality of the goods was held to be inherent in the contract of sale. In the case of faults of quality the purchaser could, by the edict of the curule aediles, either recover part of the purchase-money by actio quanti minoris, or rescind the contract by actio redhibitoria.

By English law mere inadequacy of price affords no ground for setting aside a sale, unless it be so gross as to afford a necessary presumption of fraud and imposition, and then a court of equity will grant relief. By Roman law a vendor could, under a constitution of the Emperor Diocletian A. D. 285, rescind a contract for the sale of land on proof that the purchase-money was only half the value, unless the buyer is willing to make the price justum, Cod. 4, 44, 2.

Peculiar to the English law of sale is the provision of the Statute of Frauds, that contracts for the sale of lands are unenforceable unless they are in writing signed by the party to be charged or his agent: and, by the Sale of Goods Act, 1893, § 4, contracts for the sale of goods of the value of £10 and upwards are not enforce-

able unless in writing signed by the party to be charged or his agent, or unless the buyer accept and receive part of the goods, or unless he give something in part payment or in earnest to bind the bargain.

§ 142. Locatio autem et conductio similibus regulis constituitur; nisi enim merces certa statuta sit, non uidetur locatio et conductio contrahi. Inst. 3, 24, pr.

§ 142. Letting and hiring are governed by rules like those of purchase and sale. Unless the sum to be paid as hire is fixed, the contract is not complete.

§ 143. Vnde si alieno arbitrio merces permissa sit, uelut quanti Titius aestimauerit, quaeritur an locatio et conductio contrahatur. qua de causa si fulloni polienda curandaue, sarcinatori sarcienda uestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos conuenerit, quaeritur an locatio et conductio contrahatur. Inst. 3, 24, 1.

§ 143. And if the hire is to be fixed by an arbitrator, for instance, at the sum which Titius shall consider fair, it is a question whether there is a contract of letting and hiring. Accordingly, if I give clothes to a fuller to clean or finish, or to a tailor to mend, and the remuneration is not fixed at the time, but left to our subsequent agreement, it is a question whether there is a contract of letting and hiring.

§ 144. *Item* si rem tibi utendam dederim et inuicem aliam rem utendam acceperim, quaeritur an locatio et conductio contrahatur. Inst. 3, 24, 2.

§ 144. The same question arises if I lend a thing for use and receive in return the loan for use of another thing.

§ 145. Adeo autem emptio et uenditio et locatio et conductio familiaritatem aliquam inter se habere uidentur, ut in quibusdam causis quaeri soleat, utrum emptio et uenditio contrahatur an locatio et conductio. ueluti si qua res in perpetuum locata sit, quod euenit in praediis municipum, quae ea lege locantur, ut quamdiu [id] uectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur. sed magis placuit locationem conductionemque esse. Inst. 3, 24, 3.

§ 145. Purchase and sale are so nearly akin to letting and hiring that in some cases it is a question under which category the contract falls; for instance, when land is leased in perpetuity, as occurs with the land of municipalities, which is leased on the condition that, so long as the rent is paid, the lessee and his heirs shall continue in possession. But here the better opinion is that the contract is one of letting and hiring.

§ 146. Item [quaeritur] si gladiatores ea lege tibi tradiderim, ut in singulos qui in-

§ 146. If a band of gladiators are delivered on the following terms, that is to say, that for the

tegri exierint pro sudore denarii xx mihi darentur, in eos uero singulos qui occisi aut debilitati fuerint denarii mille, quaeritur utrum emptio et uenditio an locatio et conductio contrahatur. et magis placuit eorum qui integri exierint locationem et conductionem contractam uideri, at eorum qui occisi aut debilitati sunt emptionem et uenditionem esse; idque ex accidentibus apparet, tamquam sub condicione facta cuiusque uenditione an locatione. iam enim non dubitatur, quin sub condicione res ueniri aut locari possint.

performance of every one who leaves the arena safe and sound there shall be paid twenty denarii, and for every one who is killed or disabled there shall be paid one thousand denarii, it is disputed whether the contract is one of purchase and sale or of letting and hiring; but the better opinion is that the unharmed were let and hired, the killed or disabled were bought and sold, the contracts depending on contingent events, and each gladiator being the subject of a conditional hiring and a conditional sale, for it is now certain that both hiring and sale may be conditional.

§ 147. Item quaeritur, si cum aurifice mihi conuenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet uerbi gratia denarios CC, utrum emptio et uenditio an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem uenditionemque contrahi, operarum autem locationem et conductionem. sed plerisque placuit emptionem et uenditionem contrahi. atqui si meum aurum ei dedero mercede pro opera constituta, conuenit locationem conductionem contrahi.

Inst. 3, 24, 4.

§ 147. Again, if a goldsmith agrees to make me rings of a certain weight and fashion out of his own gold for, say, two hundred denarii, it is a question whether the contract is purchase and sale or letting and hiring. Cassius says the material is bought and sold, the labour is let and hired, but most writers hold that there is only a purchase and sale. But if I provide the gold and agree to pay him for his work, the contract is settled to be a letting and hiring.

§ 143. Justinian decided that a hiring for a sum to be fixed by an arbitrator was valid, like a sale on similar terms, if the arbitrator made his award; but that if the sum was left to the future agreement of the parties, or, § 144, if the consideration was not pecuniary but a reciprocal service, the contract was not a Consensual one of letting and hiring, but a contract innominate, deriving its validity from part execution, and to be enforced by the action in factum praescriptis verbis, Inst. 3, 24, 1, 2.

§ 145. Where Gaius speaks of ager vectigalis, Justinian speaks of ager emphyteuticus or emphyteuticarius, because in his days the

rules of these two kinds of tenure had been entirely assimilated. Ager vectigalis was land leased by a municipality, or a sacerdotal college, or the Vestal Virgins in perpetuity, or for long terms of years, for a rent (vectigal) either in money or in produce, usually amounting to one fifth or one seventh of the profits. This kind of lease, as we have already seen, was subsequently extended to imperial lands let out for cultivation (agri emphyteuticarii). Emphyteusis was the grant of land in perpetuity, or for a term of years, for an annual rent, subject to forfeiture, without claim for meliorations, on non-payment of rent by the emphyteuta for three years, or for two years if the land was held of the church. Land held in emphyteusis was alienable, devisable, descendible by intestacy. The proprietor, however, had a right of pre-emption.

Emphyteusis resembled locatio-conductio in that the property remained in the grantor, to whom a rent was payable and who in certain events might recover the land; it resembled emptio venditio in that the grantee acquired not only detention of the land granted, like the hirer (colonus), but also possession, properly so called, and a proprietary right (jus in re) that nearly amounted to property or dominion, and could be maintained by actio vectigalis, a real action against all the world, including the landlord himself.

Zeno (A. D. 475–491) decided that Emphyteusis was a contract sui generis, distinct from both locatio and venditio, and requiring for its validity, at least where the parties contracted themselves out of the rules generally applicable, to be reduced to writing, Cod. 4, 66, Inst. 3, 24, 3. As to the application of the principle res perit domino to this relation, see Inst. l. c.

Like pignus, emphyteusis is a combination of jus in personam and jus in rem; it was created by agreement without having to be followed by delivery. Cf. Windscheid, Pand. 1 § 221.

§ 146. Gladiators were either (1) prisoners of war, 'butchered to make a Roman holiday,' or slaves who had committed some offence, 1 § 13, or criminals under a capital sentence; or (2) freemen who voluntarily adopted the profession and hired themselves out (auctorati, 3 § 199) to persons who maintained troops or companies (ludi familiae) of gladiators, either to make a profit, or to win the favour of the public, by their exhibition. The first gladiatorial show at Rome was exhibited B. C. 264. The passion of the populace for these exhibitions in the palmy days of Rome amounted to a mania; and a vast revolution in public sentiment was implied in their suppression, A. D. 325, by the following constitution of Constantine, Cod. 11, 44. 'Exhibitions of bloodshed are out of place in the reign of law and the bosom of a fatherland; and gladiatorial shows, therefore, are absolutely prohibited.'

Locator denotes the person who furnishes land or a house or other article to be used by another; conductor is the person who takes the land or house (called colonus in the first case, inquilinus in the second) or other article and pays a price in money for its use. But in the case of opus faciendum, e. g. of a building to be constructed, or an article to be manufactured, the person who pays the price, that is to say, the employer or orderer, is called locator; the person who performs the work or construction and receives the price is called conductor. It may be worth inquiring how this anomaly arose, and what led to this inversion of the meanings of these correlative terms, and we shall find it in a certain incident, common to these and other contracts, and which has induced the English law to regard them as composing a single class and to denote them by a common denomination.

Deposit, loan for use, pawn or pledge, letting and hiring of a movable thing, and mandate in respect of a movable thing to be redelivered, are grouped together in English law under the head of Bailments. Bailment, derived from the French word bailler, 'to deliver,' is defined to be a delivery of a chattel (movable) for a specific purpose; or, at greater length, a delivery of goods on a condition that they shall be restored by the bailee to the bailor, or according to his direction, as soon as the purpose for which they were bailed shall be answered. These contracts, then, all imply a delivery from the bailor to the bailee and a redelivery from the bailee to the bailor or his order. Now in locatio-conductio operis faciendi, as well as in locatio-conductio rei, there is usually a delivery and a redelivery: for instance, goods are delivered to an innkeeper to be kept, or to a carrier to be transported, or materials are delivered to a manufacturer to be fashioned, and these goods and materials are to be redelivered at another time, or in another place, or in an altered form. It is this delivery and redelivery to which the Latin language would seem to look in fixing on the persons to be denoted respectively by the words locator and conductor; and, accordingly, by locator it denotes the person who lets out the thing or gives the job to be done, or who, being a freeman, lets out his services (locatio-conductio operarum), and by conductor the person who receives the thing, or the job (opus), or the services (operae), without regarding the fact that while in locatio-conductio rei or operarum the locator supplies a service for which the conductor pays the price, in locatio-conductio operis faciendi it is the locator who pays the price and the conductor who performs the service.

Colonus, or the independent person who entered into a contract of locatio-conductio respecting land, must be distinguished from the colonus who mainly composed the agricultural population under the

empire. Colonatus, the condition of the latter colonus, is an institution whose origin is obscure, but which probably began to be common as early as A. D. 200. Colonatus was not a mere contractual relation or jus in personam, but a real right or jus in rem, and may be regarded as a new form of dependent status, a condition of subjection to a superior, which may be classified with the status of familia or domestic relations. It was a condition midway between freedom and slavery. The colonus was liber and civis, but he was called by the lawgiver servus terrae. He was inseparably bound to the soil: a fugitive colonus, like a fugitive slave, was said to commit a theft of his own body, and he could be recovered by real action (vindicatio) from any one who gave him harbour. He had property, but it was called peculium, and, though he could not be deprived of it like the slave, yet he could not aliene it without the consent of his lord. With certain exceptions, he could not maintain an action against his lord, who was called his patronus. Neither a colonus nor his descendants could divest themselves of their hereditary serfdom. The colonus, having no Real right in the soil, paid no land tax, but only a personal or capitation tax, like artisans and slaves. As having an inherited condition, the colonus or inquilinus was called originarius; as subject to the capitation tax he was called tributarius, capite censitus, adscriptitius, censibus adscriptus. He paid to his lord a certain annual rent (canon), usually in kind, and always incapable of augmentation. This fixity of his rent was the principal right which he enjoyed. See Savigny's Vermischte Schriften, 15. If, seeking in Roman law for types of Feudal institutions, we find the germ of freehold tenure in Emphyteusis, the antitype of copyhold tenure may similarly be discovered in Colonatus.

§ 148. Societatem coire solemus aut *to*torum bonorum aut unius alicuius negotii, ueluti mancipior*um* emendorum aut uendendorum.

Inst. 3, 25, pr.

§ 148. A partnership either extends to all the goods of the partners or is confined to a single business, for instance, the purchase and sale of slaves.

§ 149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Q. Mucius ⟨*contra naturam societatis esse existimauit. sed Ser. Sulpicius, cuius*⟩ etiam praeualuit sententia, adeo ita coiri posse societatem existimauit, ut

§ 149. It has been much canvassed whether the law would recognize a partnership formed on the terms that a partner should have a greater share in the profit than he has in the loss. Quintus Mucius thought such an arrangement contrary to the nature of partnership, but Servius Sulpicius, whose opinion has pre-

dixerit illo quoque m*odo* coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa uideatur, ut aequum sit eum cum hac pactione in societatem admitti. n*am* et ita posse coir*i* societatem constat, ut unus pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia ualet. Inst. 3, 25, 2.

vailed, held that such a partnership was so far from invalid that a partnership might be formed on the terms that a partner should have a share in the gains and none in the losses, if the value of his services made such an arrangement fair. It is certain that a partnership may be formed on the terms that one partner shall contribute all the capital and that the gains shall be divided equally, for a man's services may be equivalent to capital.

§ 150. [Et] illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, [tamen] aequis ex partibus commodum *et* incommodum inter eos commune esse. sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in *eo* quoque quod omissum est similes partes erunt. Inst. 3, 25, 3.

§ 150. If no agreement has been made as to the division of the profit and loss, it must be in equal shares. If the shares are expressed in the event of profit but not in the event of loss, the loss must be divided in the same proportions as the profit.

§ 151. Manet autem societas eo usque, donec in eodem *con*sensu perseuerant. at cum aliquis renuntiauerit societati, societas soluitur. sed plane si quis in hoc renuntiauerit societati ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati ut hereditatem solus lucri faciat, coget*ur* hoc lucrum communicare. si quid uero aliud lucri fecerit quod non captauerit, ad ipsum solum pertinet. mihi uero, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur. Inst. 3, 25, 4.

§ 151. The continuance of partnership depends on the continuing consent of the members: the renunciation of one dissolves the partnership. If, however, the object of a partner in renouncing the partnership is to monopolize some accruing gain; if, for instance, a partner with others in all property (totorum bonorum) succeeds to an inheritance and renounces the partnership in order to have exclusive possession of the inheritance, he will be compelled to divide this gain with his partners; but what he gains undesignedly by the renunciation he keeps to himself; whatever acquisitions he makes his partner always has exclusive benefit of whatever accrues to him after the renunciation.

§ 152. Soluitur adhuc societas etiam morte socii, quia

§ 152. Dissolution of partnership is also produced by the death

qui societatem contrahit certam personam sibi eligit.
Inst. 3, 25, 5.

of a partner, for he who enters into partnership elects a determinate person with whom he is willing to be partner.

§ 153. Dicitur etiam capitis diminutione solui societatem, quia ciuili ratione capitis deminutio morti coaequatur; sed utique si adhuc consentiant in societatem, noua uidetur incipere societas.

§ 153. Loss of status (capitis diminutio) is also said to determine partnership, because by the doctrine of civil law loss of status is regarded as equivalent to death; but if the members still consent to be partners, a new partnership commences.

§ 154. Item si cuius ex sociis bona publice aut priuatim uenierint, soluitur societas. sed haec quoque societas, de qua loquimur, *id* est quae consensu contrahitur nudo, iuris gentium est, itaque inter omnes homines naturali ratione consistit. Inst. 3, 25, 7 and 8.

§ 154. Again, the sale of all the property of one of the partners, whether by the state or by private creditors, dissolves the partnership. But the private partnership of which we are speaking, that is formed by mere consent, belongs to jus gentium, and so prevails in accordance with natural reason among all men: [whereas societas publicanorum is not simply consensual and is not open to peregrini. Cf. Krueger and Studemund, Gaius, note, h. l.]

§ 148. In the absence of express agreement a partnership is limited to gains by commercial transactions (universorum quae ex quaestu veniunt) and excludes gains by inheritance, devise, donation. A remarkable incident of unlimited partnership (universorum bonorum) was that it operated a transfer of ownership by mere agreement without delivery, Dig. 17, 2, 1, 1 and 2. 'In partnership of all goods, the property of all the members becomes forthwith common, a constructive delivery being implied in the absence of actual delivery.' This rule was not applied to other forms of partnership.

§ 149. Although a partner might be exempt by the terms of the agreement from any share in the losses, yet an agreement that a partner should have no share in the gains was called a leonine partnership (societas leonina), and being contrary to the general object of the contract could not be enforced, Dig. 17, 2; 29, 2. 'Aristo records the decision of Cassius that a partnership on the terms that one should take all the profits and another bear all the loss, which he called a leonine partnership, is not binding, and Ulpian concurs.'

§§ 153, 154. In saying that capitis minutio was a mode of

dissolving partnership Gaius seems to have expressed himself too generally. Capitis minutio maxima, loss of liberty, would naturally determine such a relation. Capitis minutio media, loss of citizenship, might involve dissolution, if it were a consequence of punishment, but not simply by a person becoming a citizen of another community. Cf. Inst. 3, 25, 7 Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur; nam cum in ejus locum alius succedit, pro mortuo habetur. Nor, according to the law as stated by Justinian, was partnership dissolved by mere change of status, capitis minutio minima, as by arrogation or emancipation. Cf. Dig. 17, 2; 65, 11. Hence in the corresponding passage of his Institutes, above cited, capitis minutio is not mentioned as a ground of dissolution.

The forced sale of a person's whole estate might be the result of either a criminal or a civil proceeding, either condemnation for crime or insolvency, and in the latter case for the benefit either of the State or of private creditors. Damnatione bona publicantur cum aut vita adimitur aut civitas aut servilis conditio irrogatur, Dig. 48, 20, 1. 'Condemnation forfeits all a criminal's goods to the treasury, if it deprives of life, or involves loss of civitas (capitis minutio media), or loss of liberty (capitis minutio maxima).'

Confiscation (publicatio), under its ancient name of sectio bonorum, has already, 3 § 80, been mentioned. The quaestors of the treasury were sent into possession; the sale, which was publicly advertised (proscriptio), took place under the spear (sub hasta), the symbol of absolute dominion, and vested in the purchaser (sector) quiritarian ownership.

§ 155. Mandatum consistit siue nostra gratia mandemus siue aliena. itaque siue ut mea negotia geras, siue ut alterius, mandauerim, contrahitur mandati obligatio, et inuicem alter alteri tenebimur *in id*, quod uel me tibi uel te mihi bona fide praestare oportet. Inst. 3, 26, pr.

§ 155. Agency may contemplate the benefit either of the principal or of a stranger; that is to say, your undertaking at my request to transact my business or the business of a third person will create an obligation between us, and make us mutually liable to satisfy the demands of good faith.

§ 156. Nam si tua gratia tibi mandem, superuacuum est mandatum; quod enim tu tua gratia facturus sis, id de tua sententia, non ex meo mandatu facere debes. itaque si otiosam pecuniam domi *te* habentem hortatus fuerim, ut eam faene-

§ 156. But if I give a mandate to you to perform anything for your own exclusive advantage, the mandate is void, for what you propose to do on your own account ought to be done on your own judgment and not by my mandate. Thus if you tell me that

rares, qu*amuis e*am ei mutuam dederis, a quo seruare non potueris, non tamen habebis mecum man*dati* actionem. item si hortatus sim *ut* r*em* aliquam emeres, quam*uis* non expedierit tibi eam emisse, non tamen tibi mandati tene*bor*. et adeo haec ita sunt ut quaeratur, an mandati tene*a*tur qui mandauit tibi, ut Titio pecuniam faenerares. [sed] Seruius negauit n*ec* magis hoc casu obliga*tionem* consistere putauit, quam si generaliter alicui mandetur, uti pecuniam suam faeneraret. ⟨*sed*⟩ sequimur Sabini opinionem con*tra* sentientis, qu*ia* non aliter Titio credidisses, quam si tibi mandatum esset.

Inst. 3, 26, pr. and 6.

you have money lying in your cash-box, and, on my advice to lend it at interest, you lend it to a person from whom you cannot recover it, you will have no action of mandate against me: or if I recommend you to buy, and you lose by buying, I am not liable to be sued in action of mandate. So settled is this, that it has been questioned, whether mandate can be brought on a specific recommendation to lend to Titius; Servius holds that no obligation arises in this case any more than in that of a general recommendation to lend money, but we adopt the opposite opinion of Sabinus, on the ground that the money would not have been lent to Titius, if there had been no recommendation.

§ 157. Illud constat, si quis de ea re mandet, quae contra bonos mores est, non *con*trahi obligationem; ueluti *si* *t*ibi mande*m*, ut Titio furtum au*t* iniuriam facias. Inst. 3, 26, 7.

§ 157. It is clear that by a mandate to do an unlawful act, as to steal or commit a personal wrong, no obligation is contracted.

§ 158. Item si qui*d* pos*t* mortem meam faciendum ⟨*mihi*⟩ mande*tur*, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse.

§ 158. A mandate to be executed after the death of the mandatary is invalid by the general rule that an obligation cannot commence with the heir.

§ 159. Sed recte quoque consummatu*m* mandatum si, dum adhuc integra res sit, reuocatum fuerit, euanescit.

Inst. 3, 26, 9.

§ 159. A valid authority is annulled by revocation before a commencement of execution.

§ 160. Item si adhuc integro manda*to* mors alterutrius alicuius interueniat, id est uel eius qui manda*ue*rit uel eius *q*ui mandatum susceperit, soluitur mandatum. sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandauerit ignorans

§ 160. So the death of either the principal or the agent before a commencement of execution is a revocation of a mandate: but equity requires that, if after the death of a person giving a mandate and without having notice of his decease a mandatary exe-

eum decessisse executus fuero mandatum, posse me agere mandati actione; alioquin iusta et probabilis ignorantia damnum mihi *ad*ferret. et huic simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam soluerit, liberari eum, cum alioquin stricta iuris ratione non posse*t* liberari eo, quod alii soluisset quam cui soluere deberet.

Inst. 3, 26, 10.

cute his commission, he may recover against the heir of the principal in an action of mandate; for otherwise a justifiable and natural error would bring loss upon him. Similar to this is the rule which is supported by the weight of authority, that a debtor who pays a manumitted steward without notice of his manumission is discharged of liability; though by the strict letter of the law he is not discharged, because he has not paid the person whom he was bound to pay.

§ 161. Cum autem is cui recte mandauerim egressus fuerit mandatum, ego quid*em* eatenus cum eo habeo mandati *ac*tionem, quatenus mea interest inplesse eum mandatum, si modo inplere potuerit; at ille mecum agere non potest. itaque si mandauerim tibi, ut uerbi gratia fundum mihi sestertiis C emeres, tu se*stertiis* CL emeris, non habebis mecum mandati actionem, etiamsi tanti uelis mihi dar*e* fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit. quodsi minoris emeris, habebis mec*um* scilicet actionem, quia qui mandat, ut C milibus emeretur, is utique mandar*e* intellegitur, uti minoris, si posset, emere*tur*.

Inst. 3, 26, 8.

§ 161. If a mandatary goes beyond his mandate, he may be sued for the amount which the person giving the mandate loses by its non-execution, if the execution was possible; and he will have no right of action against the person giving the mandate. So if I give you a mandate to purchase an estate for, say, a hundred thousand sesterces, and you purchase for a hundred and fifty thousand, you will have no action of mandate against me, although you are willing to convey to me for the price at which I authorized you to buy: so Sabinus and Cassius have decided. If you buy it for less, you will have a right of action against me, for a mandate to buy for a hundred thousand sesterces is regarded as an implied mandate to buy, if possible, for any smaller sum.

§ 162. In summa sciendum ⟨*est, quotiens*⟩ aliquid gratis ⟨*faciendum*⟩ dederim, quo nomine, si mercedem statuissem, locatio et conductio contraheretur, mandati esse actionem; ueluti si fulloni polienda curandaue uestimenta ⟨*dederim*⟩ aut sarcinatori sarcienda.

Inst. 3, 26, 13.

§ 162. Finally, the delivery of material to be wrought or fashioned gratuitously, where if a remuneration had been fixed there would have been a letting and hiring, is ground for an action of mandate; for instance, if I give clothes to a fuller to be cleaned or bleached, or to a tailor to be mended.

In the contract of mandate (mandatum) the principal is called dominus or mandator, the agent procurator or mandatary.

We have already mentioned, when treating of the verbal contract of stipulation, that a guaranty was often given by the consensual contract of mandate, §§ 110–127, comm. Such a mandate is called by commentators MANDATUM QUALIFICATUM, or Mandatum Credendi. We have the principle explained in § 156: he who recommends a third person as of good credit is bound to make good his representation and to indemnify another who sustains damage from giving credit on the faith of that representation. So by English law a person not interested in a transaction who makes a false and fraudulent misrepresentation which induces another to trust and contract with a third person is answerable for the loss occasioned by his misrepresentation.

As such a representation was in effect a guaranty, and to allow an action on a verbal misrepresentation would avoid the Statute of Frauds, which requires a guaranty to be reduced to writing, Lord Tenterden's Act, 9 George IV, chapter 14, enacted that no action shall be brought whereby to charge any person upon any representation or assurance concerning the character, credit, or ability of any other person, to the intent that such other person may obtain money or goods upon credit, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Another case in which a guarantor and person guaranteed stand in the relation of mandant and mandatary occurs where A (the mandant), being indebted to B (the mandatary), directs or delegates B, at the risk of A, to obtain a promise by stipulation from a third party, C (a debtor of A's), to pay to him (the mandatary) the debt which he (C) owes to the mandant. Tua et mandantis [gratia intervenit mandatum], . . . si mandet tibi, . . . ut ipsius periculo stipuleris ab eo quem tibi deleget in id quod tibi debuerat, Inst. 3, 26, 2. This is one example of what is known as 'delegation,' a general term embracing a variety of acts in all of which there is a direction or order, to a person to do some act by which the parties to a legal transaction are changed. Thus in every delegation there are at least three parties, the Delegans or person delegating some one else to another, the Delegatus, or person thus delegated, and the Delegatarius, or person in whose favour the delegation is made, and the intention of the parties is that the act to be performed by Delegatus in favour of Delegatarius shall have the same effect as if it had been performed in favour of Delegans.

The Delegatus may be directed to bind himself to the third party (promittere) instead of to the Delegans, as in the above instance, or

to make some payment or to convey something to him (dare) or to release him from a debt (liberare). The object of the delegans in making the delegation may be to give security to a creditor, or to discharge his obligation to a creditor by giving him something in lieu of payment (Solvit et qui reum delegat, Dig. 16, 1, 8, 3), or to make a gift or grant a dos to a third party, or to make a loan to him (Si me... mutuam pecuniam rogaveris et ego meum debitorem tibi promittere jusserim, Dig. 12, 1, 32), or any other object. In the same way the act which Delegatus undertakes to do for the third party may have for its object the discharge of a debt which he owes to Delegans, or gift, or loan, &c. From what has been said it is clear that there is no necessary connexion between delegation and novation, and that delegatio may or may not involve novatio. It does so only if delegatus makes a promise to delegatarius by which an obligation due from him to delegans is put an end to, but where the act to be performed is dare or liberare no new obligation arises, so that there cannot, of course, be any novation. But in the above case of delegation (Inst. 3, 26, 3), the debtor delegated is discharged from his old debt to the person, who delegates him, by novation (cf. 2 § 38), while the new creditor, to whom he is delegated, has not only the action on the stipulation against him, but may also sue the Delegans by actio mandati contraria, if the actio ex stipulatu proves abortive. Hence in this way a creditor obtains security for his debt, his guaranty legally arising not from the delegatio itself, but from the contract of mandatum which accompanies it.

Civilians have drawn a distinction which we do not find in Roman law between delegatio and assignatio, the latter being an order on a person to pay a sum to the assignatarius on the demand of the latter, e.g. a cheque on a bank. Until payment assignans has a power of revoking the order, and assignatus may, apart from any contract with assignans, refuse to comply with the order; hence the maxim: assignation is not payment. But when payment has once been made, it has the same effect as if it had been made to assignans.

The Romans, no doubt, made great use of delegation in commercial and other transactions, especially when these were conducted by parties at a distance from one another. We know, e.g., that Cicero pater supplied Cicero filius when a student at Athens with money by the mediation of his friend Atticus who, as publican, had debtors in Greece. The procedure would be as follows:

Atticus (A, assignator), at the request of Cicero pater (C, assignatarius primus), orders Graeculus (B, assignatus) to pay to Cicero filius (D, assignatarius secundus) what Atticus owes to Cicero pater. The payment by Graeculus to Assignatarius secundus, D, discharges the debt of Graeculus to Atticus, the debt of Atticus to Cicero

pater, and if D were an independent person, creditor of Cicero pater, the debt of Cicero pater to D.

Mandate might be employed to operate a kind of transfer of obligation, or rather perhaps the right of action arising from obligation, without, like Delegation or Novation, requiring the concurrence of the debtor, by Mandatum Agendi—the mandate by the creditor of his rights of action to a third party (mandare, cedere, praestare actiones). The creditor made the third party by mandate his processual representative (cognitor, procurator, cf. 4 §§ 83, 84), the understanding being that though the mandatary must carry on the action in the name of the mandator (cf. 4 § 86), he was in fact to recover for himself. Hence such an assignee in the form of a processual agent is called cognitor or procurator in rem suam, the benefit of the obligation, as distinct from the obligation itself, being transferred to him.

It was not without difficulty that this mode of assignment was rendered suitable for its purpose, the revocable nature of the contract of mandatum and the fact that it was put an end to by the death of either party being obstacles to its becoming so. But while a cognitor or procurator, after the stage of litis contestatio in an action had been reached, when the formula was issued, had control of the proceedings, and so could not after this be removed, it came to be established that notice to the debtor of the assignment of the debt should have the same effect in the way of preventing revocation as litis contestatio, so that from the date of notice the debtor was bound to pay the debt to the assignee; cf. Sohm, § 87. Moreover, in the event of the mandate being dissolved by death, the praetor allowed the representative of the assignee to recover by actio utilis.

In later Roman law subsequently, it appears, to the time of Gaius, actio utilis was given in all cases where an intention to assign was shown, although a mandatum agendi had not been given. By this praetorian action—which is supposed by some writers to have been based on the fiction that the assignee had been made procurator, but is more probably actio in factum—the assignee sued in his own name and not in that of his creditor. Cod. 4, 15, 5, Diocletian and Maximian, A.D. 294. In solutum nomine dato non aliter nisi mandatis actionibus ex persona sui debitoris adversus ejus debitores creditor experiri potest. Suo autem nomine utili actione recte utitur. Here we may seem to have the principle of the transferability of obligations recognized in Roman law.

But the cession or assignment was never completely detached from the person and liabilities of the assigning creditor. The cessionary or assignee was open to all the exceptions, except those of a purely personal nature, that might have been opposed to the original

creditor, e.g. to compensation, or set-off of a debt, which the creditor owed the debtor; to exceptio non-numeratae pecuniae; and to an exception instituted by the lex Anastasiana, shortly before the time of Justinian, to stop the buying of claims for small sums, a statute which prevented any purchaser of a debt from recovering more than the price at which it was actually purchased. And similar objections might be raised in respect of any assignee intermediate between the original assignor and the final assignee. Thus though the actio utilis, no actio directa being possible, was brought in the name of the assignee, it may still be held that, according to the Roman view, it was only exercised in a kind of representative capacity, the bare obligation itself remaining with the original creditor. The complete transferability of obligations was unknown to jurisprudence until the law merchant gave validity to mercantile instruments, such as bills of exchange, passing freely from hand to hand; in other words, to papers payable to the Holder or Bearer, 2 § 259, comm.

In such papers the jus in personam is, as it were, incorporated in the document thus made freely assignable, the holder of an instrument of this kind being able to recover on it, although the person from whom he received it may not have been able to do so. We have instances of such papers (called negotiable) in Promissory Notes, Bills of Exchange, State obligations (documents expressing a claim against a government for a certain amount of capital debt, and having annexed to them coupons, representing claims of periodic interest), and some Debentures of industrial corporations (certificates of Shares in such industrial companies, though similar to Debentures as entitling the Holder to certain dividends or shares in the profits, are foreign to our present purpose, because they essentially and originally relate to Property or jus in rem, not to Obligation or jus in personam, the Shareholders being co-proprietors). By the use of such negotiable papers the transferability of Obligation is raised to a level with the transferability of Ownership, Savigny, Obligationenrecht, 62–70. It is to be remembered that the cession or assignment of which we have been speaking is a succession to a particular right, and is not to be confounded with the general assignment of rights and obligations in a successio per universitatem. Cession or assignment is in the strict sense the act of the creditor, but rights of action may also be transferred from one person to another by decree of a court or by the direct operation of a rule of law.

§ 161. The doctrine of Sabinus that if an agent exceed his powers in the price at which he purchases, the principal is not bound for the purchase-money even after deduction of the unauthorized excess, was not allowed to prevail, as we are informed by Justinian. See Inst. 3, 26, 8.

§ 162. It is only when the property of the mandator is entrusted to the mandatarius, such as in the cases here mentioned, that the contract of mandatum can fall under the head of Bailment.

The gratuitous character of mandatum was often in later Roman law rather nominal than real. The professor of a liberal art (operae liberales) could recover a remuneration which, however, was disguised under the name of salarium or honorarium, and could not be sued for by action of mandate before an ordinary judge, but was a matter for the extraordinary cognizance of the praetor or governor of a province. Adversus eum cujus negotia gesta sunt, de pecunia quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri. De salario autem quod promisit, apud praesidem provinciae cognitio praebebitur, Cod. (Emp. Severus and Antoninus) 4, 35, 1. 'The person whose business you transacted, as to the moneys out of your own pocket or taken up at a loan which you spent for his use, may be forced by action of mandate to reimburse you the principal and interest. But as to the salary which he promised this is a matter falling within the jurisdiction of the president of the province.' Under the liberal professions are included advocates, physicians, oculists, aurists, dentists, copyists (librarii), notaries, accountants, school-masters, nurses, rhetoricians, grammarians, geometers, land surveyors. The professors of philosophy and of civil law may receive fees voluntarily offered, but their functions are so exalted that it would be unseemly in them to ask for a pecuniary remuneration even at the tribunal of the praetor, Dig. 50, 13, 1. On the other hand, payment for services of an inferior kind (operae illiberales) could be enforced by actio locati.

The law of contractual agency was, as we have seen, only slowly developed in Roman jurisprudence. Originally the cases in which one person could bind another person by his contracts were confined to contracts made under certain circumstances by persons under power, that is to say, sons or slaves.

A right acquired by a son or slave was acquired for the father or master, 1 § 163, and when an obligation was enforceable by one of the actiones adjecticiae qualitatis, the father or master, or principal, could be sued upon it, 4 §§ 70–74. But in other cases the benefit or burden of a contract was confined to the parties contracting. The procurator or agent contracted with a third party in his own name: the third party recovered his dues from the agent by an action on the contract: and the agent would in turn recover his from the principal by an action on the mandate. There was no immediate relation between the third party and the principal, and any action in which the third party sued the principal or vice versa, could have only resulted from

CESSIO ACTIONUM, i. e. an assignment of actions between the agent and principal, or the agent and the other party to the contract.

But in process of time, the manager of a shop (institor) and captain of a ship (magister) were enabled by praetorian law to make the employer and shipowner (exercitor) liable to third parties by means of the actions institoria and exercitoria, who could sue the principal, 4 § 71. This was gradually extended so as to allow to all persons who contracted with an agent having authority for the purpose a right of action, called quasi institoria, against his employer, as well as against the agent himself, who was the contracting party.

When the praetors, proceeding by timid and hesitating steps, had reached this point, the Roman law of agency had nearly approached the system we find established in modern Europe. Under this system it is a general rule, that when an agent is duly constituted and discloses the name of his principal, so as to enable the party with whom he deals to have recourse to the principal, and contracts in his name and on his behalf, and does not exceed his authority, the principal is responsible and not the agent. But in Roman law the free agent is never regarded simply as an instrument for bringing about an agreement between the parties interested, unless he is a mere nuntius. If he makes a contract for his principal he cannot escape being a party to it and so being liable under it; though by means of an actio adjecticiae qualitatis, the principal may also be rendered liable. See above, § 103 and 4 § 34.

After explaining obligations founded on contract, Justinian, Inst. 3, 27, treats of a miscellaneous group of obligations which are neither founded on contract nor on delict, but which, as the circumstances in which they arise and their effect resemble more or less the circumstances and effect of one or other of the legal contracts, are denominated by the name of obligations quasi ex contractu. These demand from us a brief notice.

Three of them, namely, those which ground the actions by or against a tutor, by or against a curator, by or against an unauthorized agent (negotiorum gestor), clearly resemble obligations founded on the contract of mandate. The ward and minor stand to the tutor and curator nearly in the relation of principal and agent, although they are legally incompetent to give an authority (mandatum) or confer a power of administration. A person who, in the absence and without the authority of another, voluntarily interfered to protect his interests (voluntarius procurator) incurred liability and acquired rights against the person in whose affairs he interfered. English law does not recognize a title to compensation in the case of voluntary interference, unless we find a parallel in the rights of salvors in the case of property lost or endangered on the ocean.

Three other obligations quasi ex contractu, those that are enforced by an action for division of common property between tenants in common (communi dividundo), by action for partition of an inheritance between co-heredes (familiae erciscundae), by an action for demarcation of boundaries between adjoining landowners (finium regundorum), resemble the obligations arising in partnership. These actions are distinguished from all others by the adjudicatio, a clause in the formula which empowered the judex by the mere effect of his judgment to operate a transfer of property, 4 § 42. They are called mixed actions by Ulpian, because both parties are equally plaintiff and defendant, Dig. 44, 7, 37, 1; by Justinian (Inst. 4, 6, 20), because they are both real and personal, that is, are founded on obligation, but are concerned also with questions between the parties concerning ownership or inheritance, which they have to decide, Keller, Civil Process, § 87; they were, however, regarded by the jurists as properly personal actions, as arising from a quasi-contractual relation.

The obligation of a heres to a legatee, enforceable by actio legati in personam or condictio ex testamento, is another case of obligatio quasi ex contractu. The aditio of the hereditas may be regarded as an undertaking to satisfy the bequests, if there are assets for the purpose. Aditio is called Obligatio, 2 §§ 35, 36.

Again, money paid by mistake or without consideration (indebitum solutum) created an obligation to repay, enforceable by indebiti soluti condictio, which closely resembles the obligation created by the contract of mutuum, see § 91.

§ 163. Expositis generibus obligationum quae ex contractu nascuntur admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu mancipioue sunt.
Inst. 3, 28, pr.

§ 163. Having thus explained the different kinds of obligations produced by contract, we remark that obligations may be acquired not only by our own contracts, but also by the contracts of persons in our power, in our hand, or in our mancipium.

§ 164. Per liberos quoque homines et alienos seruos quos bona fide possidemus adquiritur nobis, sed tantum ex duabus causis, id est si quid ex operis suis uel ex re nostra adquirant.
Inst. 3, 28, 1.

§ 164. Free persons, also, and the slaves of another person, acquire for the person who has bona fide possession of them as his slaves; but they only do so in two cases, that is if they acquire anything by their own labour, or from the property of the person who has bona fide possession of them.

§ 165. Per eum quoque seruum in quo usumfructum

§ 165. A slave held in usufruct similarly acquires for the usu-

habemus similiter ex duabus istis causis nobis adquiritur. Inst. 3, 28, 2.

§ 166. Sed qui nudum ius Quiritium in seruo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur quam usufructuarius et bonae fidei possessor. nam placet ex nulla caus*a* ei adquiri posse; adeo ut, etsi nominatim ei dari stipulatus fuerit seruus mancipioue nom*i*ne eius acceperit, quidam existim*e*nt nihil ei adqu*i*ri.

§ 167. Communem seruum pro dominica parte dominis adquirere certum est; excepto eo quod uni nominatim stipulando aut mancipio accipiendo illi soli adquiri*t*, uelut cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IVRE QVIRITIVM L. TITII DOMINI MEI ESSE AIO EAQVE EI EMPTA ESTO HOC AERE AENEAQVE LIBRA. Inst. 3, 28, 3.

§ 167 *a*. Illud quaeritur *an* qu*od* domini nomen adiectum *effic*it, idem faciat unius ex dominis iussum intercedens. nostri praeceptores perinde ei qui iusserit soli adquiri existimant, atque si nominatim ei soli stipulatus esset seruus mancipioue acc*e*pisset. diuersae scholae auctores proinde utrisque adquiri putant, ac si nulli*us* iussum interuenisset. Inst. l. c.

fructuary in the above two cases.

§ 166. A person who has the bare quiritary property in a slave, although he is his owner, has less right in his acquisitions than the usufructuary or bona fide possessor; for under no circumstances are the acquisitions of the slave acquired for him; so that even when the slave expressly stipulates for him or accepts a thing in mancipation on his account, according to some authorities, such a bare owner acquires no right.

§ 167. A common slave acquires for all his proprietors in the proportion of their property, unless he names one exclusively in a stipulation or mancipation, in which case he acquires for him alone. For instance, if he stipulates thus: 'Dost thou promise to convey to Titius, my master?' or, when he takes by mancipation, thus: 'This thing by quiritary law I declare to be the property of Lucius Titius, my master, and for him be it purchased by this piece of bronze and bronze balance.'

§ 167 *a*. It is a question, whether the same effect is produced by the exclusive order of one of the masters, as by the exclusive mention of the name of one. My school maintain that the sole orderer is the sole acquirer, just as when one alone is named by the slave in a stipulation or mancipation; the other school maintain that all the owners acquire, just as if there had been no order.

§ 163. Justinian enacted, as we have seen, that while the peculium profecticium of the filiusfamilias, that is, the peculium which he derived from his father, remained the property of the father; and while in respect of peculium castrense and quasi castrense the son was in the position of paterfamilias, or absolute owner; in respect

of peculium adventicium, that is, other peculium derived from any other source than the father, only the usufruct should vest in the father, subject to which the ownership remained in the son. In respect of the obligations acquired by the son, the same principle was to prevail, Inst. 3, 28, pr. 'What is realized from obligations acquired by a son shall be divided, as his property is by our constitution, into ownership and usufruct; so that the usufruct of the proceeds of any action shall vest in the father, and in the son as owner, the whole right of action vesting in the father, according to the distinctions expressed in the statute.'

§ 167 *a*. Justinian decided this question in favour of the doctrine of Sabinus, Inst. 3, 28, 13.

To the persons through whom an obligation could be acquired might be added in modern systems of law the procurator or agent, when the contract of the agent is treated as if it had been made by the principal himself. But Roman law always regarded the agent who made the contract as the party to it, in other words it did not admit the principle of contractual agency. Cf. § 162, comm.

§ 168. Tollitur autem obligatio praecipue solutione eius quod debetur. unde quaeritur, si quis consentiente creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praeceptoribus plac*ui*t, an ipso iure maneat obligatus, sed aduersus petentem exceptione doli mali defendi debeat, quod diuersae scholae auctoribus uisum est. Inst. 3, 29, pr.

§ 168. Extinction of an obligation is effected chiefly by actual performance of that which is owed. Hence it is disputed, whether when a person with the consent of his creditor makes a different performance in the place of the one contracted for, he is directly discharged by law of his obligation, as my school consider him to be, or whether he nevertheless continues to be bound by direct law, but against a plaintiff trying to enforce his claim, may defend himself by the exception of fraud, as the other school maintain.

§ 169. *Item* per acceptilationem tollitur obligatio. acceptilatio autem est uelut*i* imaginaria solutio; quod enim ex uerborum obligatione tibi debeam, id si uelis mihi remittere, poterit sic fieri, ut patiaris haec uerba *me* dicere QV*OD* EGO TIBI PROMISI, HABESNE ACCEPTVM? et tu respondeas: HABEO. Inst. 3, 29, 1.

§ 169. Acceptilation is another mode of extinguishing an obligation. Acceptilation is, as it were, an imaginary performance of an obligation (imaginaria solutio). If a creditor is willing to release what a person owes him under a verbal obligation, the object may be accomplished by the latter interrogating him in these terms: 'That which I promised thee hast thou received?' upon which he answers: 'I have received it.'

§ 170. Quo genere, ut diximus, ⟨*tantum eae obligationes soluuntur, quae ex uerbis consistunt,*⟩ non etiam ceterae; consentaneum enim uisum est uerbis factam obligationem posse aliis uerbis dissolui. sed id quod ex alia causa debeatur potest in stipulationem deduci et per ⟨*acceptilationem dissolui.* Inst. l. c.

§ 170. This process, as I said, only discharges obligations that arise from verbal contract, not others; for it seems to be consistent that when an obligation is made by words, it should be dissoluble by other words. However, a debt due from any other cause may be transformed into a stipulation, and released by acceptilation.

§ 171. *Quamuis autem dixerimus fieri*⟩ acceptilationem imaginaria solutione, tamen mulier sine tutoris auctoritate acceptum facere non potest, cum alioquin solui ei sine tutoris auctoritate possit.

§ 171. But notwithstanding our statement that acceptilation is an imaginary payment, a woman without her guardian's sanction cannot release by acceptilation, although actual payment to her without her guardian's sanction discharges the debtor.

§ 172. Item quod debet*ur*, pro parte *recte* solui*tur*; a*n* autem in partem acceptum fieri possit, quaesitum ⟨*est*⟩.

§ 172. So a debt may be legally paid in part, but whether it can be released in part by acceptilation is a question.

§ 173. Est etiam alia species imaginariae solutionis per aes e*t* libram. quod et ipsum genus certis in causis recept*um* est, ueluti si quid eo nomine debeat*ur*, quod per aes et libram gestum *sit*, siue qu*id* ex iudicati causa deb⟨*eatur*.

§ 173. There is another mode of imaginary payment, namely, by bronze and balance (per aes et libram). This also is only employed in certain cases, as when a debt is due on account of a proceeding per aes et libram, or in case of a judgment debt.

§ 174. *Eaque res ita ag*⟩i*tur*: adhibe*n*tur non minus quam quinque testes et libripens. deinde is qui libera*tur* ita oportet loquatur: QV*OD* EGO TIBI TOT MILIBVS CONDEMNAT*VS SVM*, ME *EO NOMINE A* TE SOLVO LIBEROQV*E* HOC AERE AENEAQVE LIBRA. HANC TIBI LIBRAM PRIMAM POSTREMA*M*QV*E* EXPEND*O* ⟨*SECVNDVM*⟩ LEGEM PVBLICAM. deinde asse percutit libram eumque d*a*t e*i* a qu*o* liberatu*r*, ueluti soluendi causa.

§ 174. This proceeding is thus effected. There must be present five witnesses and a holder of the scales, and the person to be released must say these words: 'Whereas I am condemned to thee in so many thousand sesterces, that debt I pay and discharge by this bronze and balance of bronze. This is the first, this the last, pound of bronze that I weigh out to thee according to the public statute (the Twelve Tables).' Then he strikes the scales with the bronze money and gives the latter to the creditor as if in payment.

§ 175. Similiter legatarius heredem eodem modo liberat

§ 175. Similarly, the legatee releases the heir from a legacy

de legato quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus condemnat*um* se esse significat, ita heres *testamento* se dare damnatum esse dicat. de eo tamen tantum potest heres eo modo liberari, quod pondere numero constet; et ita si certum sit. quidam et de eo quod mensura constat *idem* existimant.

left in the form of condemnation (per damnationem), except that whereas the judgment debtor recites the fact that he is a condemned person (condemnatum), the heir recites that he is charged (damnatum) by the testament of the deceased to pay the legacy. An obligation can be thus discharged only if certain in amount and estimated by number or weight, or, according to some, by measure.

§ 176. Praeterea nouatione tollitur obligatio; ueluti si quod tu mihi debeas, a Titio dari stipulatus sim. nam interuentu nouae personae noua nascitur obligatio et prima tollit*ur* translata in posteriorem, adeo ut in*ter*dum, licet posterior stipulatio inutilis sit, tamen prima nouationis iure tollatur; ueluti si quod mihi debes, a Titio post mortem eius uel a muliere pupilloue sine tutoris auctoritate stipulatus fuero. qu*o* casu rem amitto; nam et prior debitor liberatur et posterior obligatio nulla est. non id*em* iuris est, si a seruo stipulatus fuero; nam tunc ⟨*prior*⟩ proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuissem. Inst. 3, 29, 3.

§ 176. Novation is another mode of extinguishing an obligation, as when I stipulate with Titius that he shall pay me what you owe me, for the intervention of a new person gives birth to a new obligation, and the first obligation is done away with, being transformed into the succeeding one. So much so that sometimes, even though the new stipulation is invalid, the previous one is done away with by novation; for instance, if you owe me a sum, and I stipulate from Titius payment thereof after his death, or if I stipulate payment thereof from a woman or ward (pupillus) without the guardian's sanction, in this case my claim is extinguished, for the first debtor is discharged, and the subsequent obligation is void. The same does not hold if I stipulate from a slave, for then the former debtor continues bound, just as if there was no subsequent stipulation.

§ 177. Sed si eadem persona sit a qua postea stipuler, ita demum nouatio fit, si quid in posteriore stipulatione noui sit, forte si condicio *aut dies aut sponsor* adiciatur aut *de*trahatur. Inst. l. c.

§ 177. But when the original debtor is himself the promisor, a second stipulation only operates a novation if it contains something new; if a condition, for instance, or a time for payment, or a sponsor, is added or omitted.

§ 178. Sed qu*od* de sponsore dix*imus*, non constat; nam

§ 178. Respecting the sponsor, however, this statement is not

diuersae scholae auctoribus placuit nihil ad nouationem proficere sponsoris adiectionem aut detra*c*tionem.

§ 179. Quod autem diximus, si condicio adiciatur, nouationem fieri, sic intellegi *oportet*, ut ita dicamus factam nouationem, si condicio extiterit; alioquin si defecerit, durat prior obligatio. sed uideam*us*, num is qui eo nomine agat doli mali aut pacti conuenti exceptione possit summoueri, quia uidetur inter eos id actum, ut ita ea res peteretur, si posterioris stipulationis extiterit condicio. Ser. tamen Sulpicius existimauit statim et pendente condicione nouationem fieri, et si defecerit condicio, ex neutra causa agi posse ⟨*et*⟩ eo modo rem perire. qui consequenter et illud respondit, si quis id, quod sibi L. Titius deberet, a seruo fuerit stipulatus, nouationem fieri et rem perire, quia cum seruo agi non posset. ⟨*sed*⟩ in utroque casu alio iure utimur. nec magis his casibus nouatio fit, quam si id quod tu mihi debeas a peregrino, cum quo spons*us* communio non est, SPONDES uerbo stipulatus sim. Inst. l. c.

§ 180. Tollitur adhuc obligatio litis contestatione, si modo legitimo iudicio fuerit actum. nam tunc obligatio quidem principalis dissolui*tur*, incip*i*t autem teneri reus liti*s* contesta-

free from doubt, for the other school held that novation is not operated by a sponsor being added or omitted.

§ 179. The statement that the introduction of a condition operates a novation must be restricted to mean, that a novation is produced if the condition is accomplished; for otherwise if the condition fails the prior obligation continues in force. However, it is a question, whether the creditor who sues on such a prior obligation cannot be repelled by the exception of fraud (doli), or of informal agreement not to sue; since it seems to have been the intention of the parties that the debt should be only recoverable if the condition of the second stipulation were realized. Servius Sulpicius even held that novation occurs immediately, and while the accomplishment of the condition is still uncertain; and that, if the condition fails, neither obligation can be sued upon, and the creditor's claim is extinguished; and, consistently herewith, he held that, if the debt due from Lucius Titius is stipulated by the creditor from his slave, novation takes place, and while the original obligation is extinguished, the second is void because the slave cannot be sued. But in both cases the contrary rule prevails, and no novation occurs in these cases any more than it occurs if an alien, who cannot be sponsor, promise payment of a debt due from you to me by the solemn term 'spondeo.'

§ 180. The extinction of an obligation is also effected by joinder of issue (litis contestatio), at least of a statutable action (judicium legitimum, 4 § 104). Then the original obligation is dis-

tione; sed *si* condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc ⟨*est*⟩ quod apud ueteres sc*rip*tum est, ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere.

solved, and a new obligation is imposed on the defendant, by joinder of issue. But if he is condemned, the obligation arising from joinder of issue is discharged, and a new obligation arises from the judgment. Hence the saying of the old jurists, that, before action brought, a debtor is bound to pay his debt; after joinder of issue he is bound by the condemnatio of the formula; after condemnation passed, he is bound to satisfy the judgment.

§ 181. Vnde fit, ut si legitimo iudicio debit*um* petiero, postea de eo ipso iure agere non possim, quia inutiliter in*ten*do DARI MIHI OPORTERE, quia litis contestatione dari oportere desiit. aliter atque si imperio continenti iudicio egerim; tunc enim nihilo minus obligatio durat, et ideo ipso iure postea agere possu*m*, sed debeo p*er* exc*ep*-*tio*n*em* rei iudicatae uel in iudicium deductae summoueri. quae autem legitima iudicia et quae imperio continent*ia* ⟨*sint*⟩, sequenti commentario refe*r*emus.

§ 181. Accordingly, after suing by statutable action, the extinction of the original obligation disables me by strict law from bringing a second action, for the declaration that the defendant is bound to convey something to me is false, as joinder of issue in the first action terminated his obligation. It is otherwise if I sued at first by an action depending on the executive power (imperium) of the praetor, 4 § 105. For then the original obligation continues, and so, according to strict law, its non-extinction permits me to bring a second action; but I may be repelled by the exception of previous judgment (res judicata) or previous joinder of issue (res in judicium deducta). What actions are statutable, and what determine with (or, derive their force from) the praetor's executive power, will be explained in the next book of these Institutes.

§ 168. Gaius only considers at present the modes of extinguishing an obligation, i. e. the modes whereby an obligation ceases to exist. In the next book, 4 § 115, he will treat of the exceptio, that is to say, a defence to an action whereby, though the right of the plaintiff continues to exist, it is deprived of its operation by being confronted with an adverse right of the defendant; which defence required to be alleged with the permission of the praetor in a special clause of the formula called the exceptio.

Every obligation, as we have seen, 3 § 88, comm., relates to a certain dare, facere, or praestare; that is to say, the actual performance (solutio) of every obligation will consist in either dare, facere, or praestare.

The doctrine of Sabinus, that a substituted performance with the consent of the creditor (in solutum datio) operates the extinction of an obligation, was the view that ultimately prevailed. Manifesti juris est, tam alio pro debitore solvente, quam rebus pro numerata pecunia consentiente creditore datis tolli paratam obligationem, Cod. 8, 42, 17. 'It is certain that payment by a third person, or the substitution of other things for money, with the consent of the creditor, discharges an obligation.'

§§ 169, 170. Acceptilation, the release of an obligation contracted by stipulation by means of a contrary stipulation, was probably at first not a mode of discharge by itself but had to be accompanied by an actual payment of the debt. Subsequently it operated as a release by the fiction of payment having been made—acceptilatio est veluti imaginaria solutio (cf. Sohm, § 89). It was only, however, a form of release from verbal obligations, but Aquilius Gallus, the colleague of Cicero in his praetorship, the pupil of Quintus Mucius and teacher of Servius Sulpicius, the inventor of formulas relating to dolus malus, Cic. de Off. 3, 14, made it a mode of releasing from all obligations by a general form called acceptilatio Aquiliana, which is here referred to, cf. Inst. 3, 29, 2. 'There is a stipulation called Aquilian, whereby all obligations are transmuted into a verbal one, and forthwith discharged by acceptilation. For the Aquilian stipulation operates a novation of all preexisting debts, and is thus expressed: "Whatever thing, on whatever title, thou art or shalt be bound to convey to me or to perform for me now or hereafter, absolutely or conditionally; whatever thing I have or shall have an action, personal, real, or extraordinary, against thee to recover; whatever thing of mine thou hast, detainest, possessest, hast possessed, or hast fraudulently parted with possession of; whatever sum is the value of all these things, that sum dost thou promise to pay me?" so asks Aulus Agerius, and Numerius Negidius answers: "I promise." Then Numerius Negidius asks of Aulus Agerius: "Whatever I have promised thee to-day by the Aquilian stipulation, hast thou received it all in full?" and Aulus Agerius answers: "I have, and have given thee my release."'

The narrative form (stipulatus est, spopondit, interrogavit) in which the transaction is expressed by Justinian, properly belongs, not to the stipulation and acceptilation, but to the written memorandum (cautio) in which they are recorded.

§ 172. It was subsequently an established doctrine that a partial release by acceptilation was valid, Dig. 46, 4, 13, 1.

§§ 173-175. It might perhaps have been expected that the release

of a legacy would be operated per aes et libram, because the will containing the bequest was a transaction per aes et libram, on the principle that all obligations may be released by the process whereby they were contracted. Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur, Dig. 50, 17, 35. Omnia quae jure contrahuntur contrario jure pereunt, Dig. 50, 17, 100. Fere quibuscunque modis obligamur, iisdem in contrarium actis liberamur, Dig. 50, 17, 153. 'To every mode of obligation there is an obverse mode of liberation.'

But nexi liberatio is only applicable to legatum per damnationem, nor is it easy to explain why a judgment debt and legacy in this form could only be released by the proceeding with the bronze and scales. It was evidently the appropriate way of discharging nexal debtors, and, when it came to be accompanied by only an imaginary payment, was apparently used as a general form for releasing all debtors who were in the position of nexi, including not only judgment debtors, but also an heir solemnly charged with the payment of a legacy by the form of condemnation (per damnationem). Cf. Sohm, § 89.

It is to be noticed that Gaius says nothing of exoneration from an obligation contracted literis, but it is clear that as a debt could be constituted by expensilatio, so it could be cancelled by a corresponding accepti relatio.

A consensual contract, not yet followed by partial execution (re nondum secuta, Inst. 3, 29, 4), could be dissolved by a contrary agreement (or in the cases of mandate and partnership by mere dissent). Hae obligationes quae consensu contrahuntur contraria voluntate dissolvuntur, ibid. 'Obligations which consent creates, a contrary accord dissolves.' But after a part performance, that is performance by one of the parties, the contract must not be thus abandoned by the other unless he made restitution, Cod. 4, 45, 1.

Not only could the obligation created by consensual contract be extinguished by consent, but obligation created by delict could by certain statutes or otherwise be obliterated by agreement or compromise, or at least made unenforceable. Legitima conventio est quae lege aliqua confirmatur, et ideo interdum ex pacto actio nascitur vel tollitur quotiens lege vel senatusconsulto adjuvatur, Dig. 47, 10, 6. Thus the obligations and actions arising out of outrage (injuriarum) and theft could be extinguished by the parties coming together, in the latter case, by enactment of the Twelve Tables.

§ 176. It seems irrational that an invalid contract should be held to operate a novation, but an agreement might be valid as obligatio naturalis though unenforceable at Civil law; and in respect of

Novation naturalis obligatio was placed on a level with civilis obligatio. Novatio est prioris debiti in aliam obligationem, vel civilem vel naturalem, transfusio atque translatio, hoc est cum ex praecedenti causa ita nova constituatur ut prior perematur. . . . Qualiscunque igitur obligatio sit quae praecessit, novari verbis potest, dummodo sequens obligatio aut civiliter teneat aut naturaliter, ut puta si pupillus sine tutoris auctoritate promiserit, Dig. 46, 2, 1. 'Novation is the merger and transfer of a prior debt into a subsequent obligation, civil or natural; or the destruction of a prior obligation by the constitution of a new one. Every kind of obligation can undergo novation by verbal contract, provided that the subsequent obligation binds either as civilly enforceable or as merely a natural one, as the promise of a ward without his guardian's sanction.'

§ 177. We have already seen an instance of novation when treating of delegatio, §§ 155-162, comm., the satisfaction of a debt by substitution of a debtor. The substituted debtor who discharges by stipulation the first is called an expromissor, §§ 110-127, comm.

§ 178. We see by Justinian, Inst. 3, 29, 3, that the addition or omission of a fidejussor was finally held to operate a novation.

§ 179. Servius Sulpicius was wrong because novation implies a subsequent obligation, but a conditional obligation is really no obligation until the condition is realized. So if the prior obligation is conditional and the second obligation absolute, the novation is not absolute but conditional, because there is really no prior obligation until the condition is realized, at which moment novation takes place, and the prior obligation is extinguished.

Justinian, on account of the frequency of disputes as to whether the parties had the intention of novation, enacted that no contract should operate a novation, unless the stipulating parties expressly declared their intention that such novation should be produced, Inst. 3, 29, 3 *a*; Cod. 8, 41, 8.

§ 180. LITIS CONTESTATIO, Joinder in issue, or the settlement of the issue to be tried by the judex, denoted, under the system of statute-process, when pleadings were oral, the close of the proceedings in jure, when, the praetor having allowed an action, each party called those who were present to attest the nature of the issue allotted to be tried. Festus. 'Contestation is when both parties exclaim, "Give your attestation." It marks the definitive settlement of the issue to be tried.' Under the formulary system the term was still employed, but marked the moment when the praetor delivered the written formula containing the commission of the judex. Under the third period of the law, when the praetor or highest judicial functionary was himself the judex, that is, no longer delegated the cause to a judex privatus, but either heard and determined it himself

or delegated his authority to an official (judex pedaneus), Litis Contestatio denoted the commencement of the trial before the judex. Lis enim tunc contestata videtur, quum judex per narrationem negotii causam audire coeperit, Cod. 3, 9, 1. 'Litis contestatio is the moment when the judge begins to hear the recital of the cause of action.' By legitima judicia, 4 § 103, Gaius denotes those actions in the formulary procedure which by provision of the lex Aebutia, whereby statute-process was abolished, were put on the same footing as the legis actiones and so had the same effect, in respect of novation and otherwise, as this statute-process, which they superseded, cf. Sohm, pp. 260, 267. Actions terminable with the praetorship were such actions as did not derive their validity from the lex Aebutia, but simply from the executive power of the praetor (quae imperio continentia, § 101, cf. 4 § 105).

The transformations of Litis contestatio which are described above were not the last that it was destined to undergo. In the first stage of procedure under the Canon law, after the libellus of the plaintiff had been read aloud, the judge asked the plaintiff whether he abided by his suit; and, on his answer in the affirmative, his libellus was contradicted by the defendant in general terms (nego narrata prout narrantur et dico petita fieri non debere). The detailed contention of the parties over the particular averments of the plaintiff did not follow till a subsequent stage.

In Germany in A.D. 1654 an ordinance of the empire required the defendant to answer all the allegations of the plaintiff and adduce all his own exceptions at the first stage: and, as in practice the reading of the plaintiff's libellus was omitted, the Litis contestatio, or first term or stage of the suit, consisted in this detailed answer of the defendant. Subsequently, when written documents superseded oral procedure, the Litis contestatio was identified with the defendant's delivery of what was called his book of exceptions.

The Novation produced by Litis contestatio is called by modern writers Novatio necessaria. It has not all the incidents of Novatio voluntaria, or Novation induced by agreement: for instance, as Litis contestatio must not deteriorate the position of the creditor, the object of its incidents being to remove the disadvantages which he suffers from the duration of the suit, it does not extinguish the accessories of the principal obligation, e.g. interest, fidejussio, hypotheca, Dig. 46, 2, 29. It originally, as we have seen, in consequence of the Correality of the Fidejussor, i.e. the unity of his obligation with that of the principal, extinguished the liability of the Fidejussor: but this rule, as we have mentioned, was abrogated by Justinian, who enacted that the liability of the Fidejussor could not be extinguished by Litis contestatio, but only by Solutio.

Nor, secondly, did Novatio necessaria, though it extinguished Civilis obligatio, prevent, like Novatio voluntaria, the continuance of Naturalis obligatio, Dig. 12, 6, 60.

Under Justinian Litis contestatio lost half of its effect: it still retained the positive function of generating a new obligation; but it ceased to have the negative function of extinguishing the old obligation. From this time, accordingly, we cease to hear of process-consumption of this kind whether extinctive (litis consumptio ipso jure) as relating to statutory actions, or counteractive (exceptio rei in judicium deductae) as relating to actions dependent on the authority of the praetor. Indeed the former of these (litis consumptio ipso jure) had disappeared long before, contemporaneously with the disappearance of legitima judicia; that is to say, with the abolition under Diocletian of the ordo judiciorum (formulary system), and the transformation of all procedure into cognitio extraordinaria.

Gaius attributes a Novative power not only to Litis contestatio, but also to Judgment (res judicata). Judgment, like litis contestatio, has two functions, one Negative, the other Positive. By its Negative operation it extinguishes the previous right of action: by its Positive it entitles, in the event of Condemnatio, to Execution. The Positive function is in the interest of the plaintiff: the Negative principally in the interest of the defendant. Under Justinian the novative effect of Judgment, as well as that of Litis contestatio, was considerably altered. It was partly narrowed: e.g. an absolution on the ground of Plus petitio, 4 § 53, or of a dilatory exception, 4 § 120, no longer grounded an exceptio rei judicatae: and it was partly extended: for instance it founded exceptio rei judicatae not only in respect of the principal question, but also in respect of incidental questions, whose decision was preliminary to that of the principal question, and in respect of any exceptions or replications. In view of these changes it is said that Res judicata, like Litis contestatio, while it retained its positive functions, lost its negative functions. But while it still generated an exceptio rei judicatae it seems difficult to say that it ceased to have a negative or consumptive operation: though this was attenuated, and made more rigorously subsidiary to the positive operation; and was henceforth left entirely to the discretion of the praetor.

The present seems to be the most convenient occasion that we shall find for gathering together in one conspectus the various operations and effects of Litis contestatio: fuller explanations of each will be found scattered over this treatise in connexion with the various matters to which such operations relate.

1. The principal operation was originally the processual con-

sumption of a right of action (litis consumptio) which has just been described: the barring of any subsequent suit in virtue of the maxim: De eadem re ne bis sit actio, Quintilian, 7, 6, 1, either by extinction (ipso jure) or by counteraction (ope exceptionis) of the plaintiff's right to sue. This occurred, as we shall see, 4 § 103, even when in consequence of process-prescription there was no judgment, or when, by reason of Plus petitio or some dilatory plea, there was a judgment against the plaintiff but not upon its merits. The operation was gradually abrogated before the time of Justinian, only leaving traces of itself in the Novatio necessaria, which extinguished indeed civilis obligatio but left a naturalis obligatio, sufficient to support the pignora or hypothecae by which the plaintiff was protected. Processual consumption had only considered the Intentio of the action that was brought: the exceptio rei judicatae, by which in later times the same or similar objects were accomplished, regarded the exact import of the Sententia. The most signal departure from the principle of processual consumption was perhaps Justinian's constitution, Cod. 8, 40, 28, concerning Correality and Fidejussio, §§ 110–127, comm. As Correality is a single obligation imposed on several debtors, a suit against one extinguished the obligation of the remainder: e. g. a suit brought against a principal extinguished the right of suing the surety, and vice versa. Justinian enacted that the obligation of the remaining correal debtors should not be extinguished even by judgment against one, but only by complete satisfaction of the plaintiff's claim.

2. (*a*) Litis contestatio, in the classical period, by interrupting Prescription, 4 §§ 110–113, comm., saved the plaintiff's title from being barred by lapse of time. At a later period, Prescription was interrupted by a still earlier event, Insinuatio or registration in court. As soon as Prescription of the right of action was thus interrupted, Prescription of pendency began to run, 4 §§ 104, 105.

Moreover, respecting the plaintiff's Title or ground of action it is a general rule that no causa superveniens, or entitling event, subsequent to Litis contestatio can avail to save the plaintiff from losing the action already brought, though it may give him the right to bring another. Further, as a general rule, the ground of action must not only exist before Litis contestatio but must continue up to condemnatio. Otherwise in virtue of the maxim: Omnia judicia esse absolutoria, though there was a difference of opinion between the Sabinians and Proculians on this point, 4 § 114, the defendant will be absolved. E. g. if the defendant in a condictio furtiva was a conditional legatee of the thing which he has stolen from the heir who sues him for damages, and the condition is fulfilled after Litis contestatio, the defendant is acquitted, Dig. 13, 1, 14, pr.

(*b*) Litis contestatio made an exception to the latter rule in respect of the ancient institution of Usucapio; which though not interrupted by litis contestatio, did not entitle the defendant to absolution, as litis contestatio made it revocable, Dig. 6, 1, 18. Longi temporis praescriptio, like other forms of Prescription, was interrupted by litis contestatio, or, in later times, by Insinuatio: and from Cod. 7, 33, 10 and Cod. 7, 40, 2, this seems to have been the result when Justinian transformed longi temporis possessio into Usucapion. Savigny, however, § 261, and Vangerow, § 160, hold that then the rule of Prescription was in this respect superseded by the rule of Usucapion: that litis contestatio or insinuatio produced, that is to say, not interruption but liability to revocation. (As to this difference between Usucapio and longi temporis possessio, see Grueber's Lex Aquilia, p. 240, and Windscheid's Pandekten, § 180, note 7.)

(*c*) Litis contestatio produced another exception to the rule in the event of the destruction of the subject of litigation by casualty (casus). In Real actions if the defendant is a Mala fide possessor: in Personal actions if he is a debtor chargeable with mora, destruction of the subject, although ascribable to Casus, and notwithstanding the maxim: Impossibilium non est obligatio: does not save the defendant from condemnation. In the absence of Mala fides and Mora, casual destruction of the subject entitles the defendant, in virtue of the above maxim, to absolution.

(*d*) Litis contestatio makes transmissible a right of action which before was untransmissible, 4 § 112, comm. Vindictive actions (actiones vindictam spirantes), so long as there has been no litis contestatio, are incapable of active transmission; i. e. transmission to the heir of the plaintiff: and penal actions are incapable of passive transmission; i. e. transmission to the heir of the defendant. But when once litis contestatio has taken place, these actions, in the event of the subsequent death of the plaintiff or defendant, become capable respectively of active and passive transmission.

(*e*) In an action arising from delict when a man is only suable to the extent of his enrichment thereby, the question whether he is enriched or not is decided entirely by his circumstances at the moment of litis contestatio.

It was stated that as a general rule the plaintiff's title to judgment was required to be in existence before litis contestatio. This is subject to exception in respect of some of the subordinate elements of title, certain minor conditions of judgment in his favour which agree in the common character that, in the formulary period, they were not expressed, as conditions of the judgment, in the intentio of the formula. E. g. in vindicatio the possession of the subject by the

defendant, although it commences after litis contestatio, suffices to render him liable to be condemned. So in the actio de peculio, the existence of a peculium; in the actio mandati, the existence of moneys belonging to the principal in the hands of the agent; in the actio pigneraticia, the satisfaction of the debt by the mortgagor; all respectively conditions of a judgment in favour of the plaintiff, render the defendant liable to condemnatio even when they are events subsequent to the institution of the suit.

The same applies to certain exceptions: in the exceptio divisionis the question respecting the solvency of co-guarantors, § 121, and in the beneficium competentiae, 4 §§ 39–44, comm., the question respecting the means of the defendant is decided according to the circumstances in existence at the moment of condemnation.

3. Litis contestatio has hitherto been considered in respect of its influence on the Conservation or Destruction of a ground of action. We proceed to its effect on the Amount of the condemnation or of the damages to be awarded.

(*a*) To save the plaintiff from being injured by the unavoidable duration of the suit, without, however, deterring the defendant from the defence of what he honestly believes to be his rights, a judgment against the defendant requires him to restore Omnis Causa, i. e. omne quod habiturus esset actor, si statim judicii accepti tempore res ei reddita fuisset, Dig. 6, 1, 20, all that the plaintiff would have had if restitution had been made to him at the moment of litis contestatio. This implies the restitution of Fructus, all the gain of whatever nature that the defendant has derived from the fact of possession. If the object claimed is a sum of money, the defendant, notwithstanding the absence of mora, must pay Interest from the date of litis contestatio, cf. 2 § 280, comm.

(*b*) After litis contestatio the defendant, the bona fide possessor as well as the mala fide possessor, the debtor free from mora as well as the debtor chargeable with mora, is liable for Culpa of every kind and degree, and responsible for the destruction and deterioration thereby occasioned. E. g. he is liable for neglected fruits (fructus percipiendi) as well as for fructus consumpti and fructus extantes, for the omission to collect the fruits is a piece of culpable supineness.

(*c*) Litis contestatio in actiones stricti juris fixes the moment to be regarded in the valuation of the plaintiff's interest in the subject of dispute (litis aestimatio). In bona fide actions this date is given by the moment of Condemnatio. See 4 §§ 45–52, comm.

4. Litis contestatio affects the character of the object of litigation, which it converts into res Litigiosa, thereby rendering unlawful its alienation by the plaintiff or defendant. See 4 § 117 *a*.

§ 182. Transeamus nunc ad obligationes quae ex delicto nascu*n*tur, ueluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit; quarum omnium rerum uno genere cons*i*stit obligatio, cum ex contractu obligationes i*n* IIII genera d*i*ducantur, sicut supra exposuimus.

§ 182. We proceed to obligations which originate in delict; theft, for instance, rapine, damage to property, or outrage; which are all of one kind, whereas contractual obligations are divided into four classes, as we have explained above.

All actions suppose the violation of some right, but they are not necessarily founded on a wrong or delict. Thus a possessor of another man's property, though no wrong be imputable to him, is subject to vindicatio. Actions on contract, however, suppose a wrong, namely, a wrongful act or omission constituting a breach of contract, but the plaintiff recovers damages with the object merely of putting him in the same position as if the contract had been fulfilled. Delict (delictum, maleficium), on the other hand, is generally used in a limited sense, to signify any wrong or unlawful act in itself, such as theft or assault, regarded as specially injurious apart from the loss which it causes. In early law indeed the default of a debtor is treated as if it were a delict, but in later times the acts which the law designates as delicts involve a violation not of a jus in personam or right available against a determinate person, but of a jus in rem or right available against all the world, such acts as are considered especially injurious to the individual or to the community.

Delicts or wrongs came to be divided into public and private. Public wrongs are those delicts called crimes, private wrongs are those delicts which in early times were left to private vengeance, for which an action brought by the injured party against the wrongdoer was afterwards substituted. Injuries, which in modern law are punished exclusively as crimes, could throughout the history of Roman law be vindicated by the injured party as private wrongs. Crimes have been defined to be such unlawful acts as are injurious in the first instance to the State; civil injuries, such as are harmful, principally or exclusively, to private individuals. But this definition is not satisfactory, because all or most crimes are injurious to private individuals, and all or most civil injuries are harmful to the community. A better definition is the following: Crimes are those unlawful acts which the state itself visits with punishment, considering them to be specially injurious to its interests; private delicts are unlawful acts or offences which the injured party may himself vindicate by action. The same unlawful act which in one stage of society is pursued as a private delict may, at a subsequent stage, be punished

as a crime. So, again, in later Roman law the same delictal act, e. g. furtum, might be pursued either as a crime or as a civil injury.

The following may be taken as a kind of rough classification of actions. Every right of action arises out of a violation of some positive or negative duty.

(1) A violation of a positive duty to perform or negative duty of forbearance may be a violation of a jus in personam, and found an action for breach of contract, called an action ex contractu, or may be the violation of some right which is regarded as if it were the breach of a contract, giving rise to an actio quasi ex contractu.

(2) A violation of a negative duty, that is, duty to abstain, may be a violation of a jus in rem, which, if it is an offence called delict, gives rise to an action enforceable by the individual aggrieved, or similarly, if the violation is one which, though not strictly a delict, is treated as if it were so, it gives rise to an actio quasi ex delicto.

(3) Or violations of duties giving rise to actions and other remedies which are founded simply on the fact of ownership or possession, such as vindicatio, actio Publiciana, the possessory interdicts.

But there are many miscellaneous actions which cannot be easily brought under any of the above heads.

Actions ex contractu seek to enforce both the rights immediately founded on a contract and those created by a party's subsequent unlawful intention (dolus) or carelessness (culpa) in relation to the contract.

Real actions and actions ex contractu are simply restitutory in their object; they imply that a defendant HAS something which he ought not to have: withholds from the plaintiff some thing or service of pecuniary value to which the plaintiff is entitled. Actions ex delicto do not necessarily imply that the defendant HAS what he ought not to have; they necessarily impute unlawful conduct (dolus or culpa) to the defendant, § 211, and imply imputability, or responsibility for such conduct.

In respect of contracts Culpa is distinguished as of different degrees; and sometimes a higher, sometimes a lower degree is capable of generating obligation. In respect of delicts, that is, the delict of damage to property, Culpa is not distinguished by gradations; any neglect of ordinary care suffices to generate obligation.

The object of an action ex delicto may be either simply to recover a penalty (e. g. actio furti), or partly to recover a penalty and partly to obtain damages (e. g. actio vi bonorum raptorum), or it may be to obtain personal satisfaction for the injury caused by the offence (e. g. actio injuriarum); but we shall find that in every case a delictal action has characteristics, which do not belong to a merely restorative action. (Cf. Inst. 4, 6, 17 and 18.) Real actions and

actions ex contractu are not Delictal but Civil, Conservative, or Restorative; they maintain the fortunes of both parties at their original level; at the level destroyed or lowered by the defendant's act or omission. We have before used the term Civil to distinguish the Private code from the Political code and the Criminal code. We here take it in a narrower sense to distinguish that part of the Private code which deals with Domestic relations and the Law of Property, including Obligation ex contractu, from that part which deals with Obligation ex delicto, which latter part has more resemblance to the Criminal code. The jurisprudence of delicta privata forms a sort of intermediate between Civil jurisprudence, in this narrower sense, and Criminal jurisprudence which relates to delicta publica.

§ 183. Furtorum autem genera Ser. Sulpicius et Masurius Sabinus IIII esse dixerunt, manifestum et nec manifestum, conceptum et ob*l*atum; Labeo duo, manifestum ⟨*et*⟩ nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohaerentes quam genera furtorum; quod sane uerius uidetur, sicut inferius apparebit. Inst. 4, 1, 3.

§ 183. Thefts are divided by Servius Sulpicius and Masurius Sabinus into four kinds, theft manifest and not manifest, the possession of stolen goods discovered upon search, and the introduction into a house of stolen goods. Labeo makes only two kinds, theft manifest and not manifest, because the possession and introduction of stolen goods are not kinds of theft, but rather circumstances giving rise to special actions connected with theft; and this seems the better opinion, as will presently appear.

§ 184. M*ani*f*e*stum *fur*tum quidam id esse dixerunt, quo*d* dum fit deprehenditur. alii uero ulterius, quod eo loco deprehendi*tur*, ubi fit, ueluti si in *o*liueto oliuarum, in uineto uuarum furtum factum est, quamdiu in eo olиueto aut uineto fu*r* sit; a*ut* si in domo furtum factum sit, quamdiu in ea domo fur sit. alii adhuc ulterius eo usq*ue* manifestum furtum esse dixerunt, donec perferret eo, quo perferre fur destinasset. alii adhuc ulterius, quandoque eam rem fur tenens uisus fuerit; quae sententia non optinuit. sed et illorum

§ 184. Manifest theft is limited by some to detection in the act of taking; by others extended to detection while the thief is in the place where the theft is committed; for instance, if olives are stolen from an oliveyard, or grapes from a vineyard, while the thief is in the oliveyard, or vineyard; or if a theft is committed in a house, while the thief is in the house. Others extend it to detection before the thief has carried the goods away to the place where he intends to deposit them; others to detection while the thief has the goods in his hands. The fourth opinion has not been adopted, and the

sententia, qui existimauerunt, donec perferret eo quo fur destinasset, deprehensum furtum manifestum esse, ideo non uidetur probari, qu*ia* magnam recipit dubitatione*m*, utr*um* unius diei an etiam plurium dierum spatio id terminandum sit. quod eo pertinet, quia saepe in aliis ciuitatibus subrept*as* res in alias ciuitates uel in alias p*ro*uincias destinant fur*es* p*er*ferre. ex duabus itaque superioribus opinionibus alterutra adprobat*ur*; magis tamen plerique posteriorem probant.
Inst. l. c.

§ 185. N*ec* manifestum furtum qu*i*d sit, ex iis quae diximus intellegitur. nam qu*od* manifestum non est, id nec manifestum est. Inst. l. c.

§ 186. Conceptum furtum dicitur, cum apud aliquem testibus praesentibus fur*tiu*a res qua*e*sita et inuenta *s*it. nam in eum propria a*ctio* constituta est, quamuis fur non sit, quae appellatur concepti.
Inst. 4, 1, 4.

§ 187. Oblatum furtum dicitur, cum res furtiua tibi ab aliquo oblata sit eaque apud te concepta sit; *u*tique si ea mente data tibi fuerit, ut apud te potius qua*m* *apud* eum qui dederit conciperetur. nam tibi, apud quem concepta est, propria aduersus eum qui optulit, quamuis fur non sit, constituta est actio, ⟨*quae*⟩ appellatur obl*a*ti. Inst. l. c.

§ 188. Est et*iam* prohibiti furti ⟨*actio*⟩ aduersus eum qui furtum quaerere uolentem prohibuerit. Inst. l. c.

§ 189. Poena manifesti furti

third opinion that, until the thief has carried the stolen goods to their place of destination, his theft may be a manifest one, is also impugned on the ground of the uncertainty whether one day or several is the limit of the time within which he must be detected; for a thief often intends to carry the goods he has stolen in one city into another city or province. The first and second opinions are commonly adopted, and more generally the second.

§ 185. What is not manifest theft will be understood from what we have said about manifest theft, for what is not the one is the other.

§ 186. The discovery of stolen goods, when a person's premises are searched in the presence of witnesses, makes him liable, even though innocent of theft, to a special action for receiving stolen goods called actio concepti.

§ 187. To introduce stolen goods is to pass them off to a man, on whose premises they are discovered, with the intent that they should be discovered on his premises rather than on those of the introducer. The man on whose premises they are found may sue the passer off, though innocent of theft, in an action for the introduction of stolen goods called actio oblati.

§ 188. An action for prevention of search may be brought against the man who prevents a person from searching on his premises for stolen goods.

§ 189. The punishment pro-

ex lege XII tabularum capitalis erat. nam liber uerberatus addicebatur ei cui furtum fecerat; utrum autem seruus efficeretur ex addictione, an adiudicati loco constitueretur, ueteres quaerebant. in *seruum* a*e*que uerbera*tum animaduertebatur*. *sed* postea inprobata est asperitas poen*a*e et tam ex serui persona quam ex liberi quadrupli actio praetoris edicto constituta est. Inst. 4, 1, 5.

vided by the law of the Twelve Tables for manifest theft was capital; a freeman was first scourged and then assigned, by judgment of the magistrate, to the person from whom he had stolen (whether made his slave by the assignment, or reduced to the condition of an insolvent judgment debtor, was a subject of controversy among the republican lawyers); a slave was also punished by scourging. But later ages disapproved of the severity of this punishment, and theft, whether by a slave or by a freeman, was punished by the praetorian edict with fourfold damages.

§ 190. Nec manifesti furti poena per legem ⟨*XII*⟩ tabularum dupli inrogatur, eamque etiam praetor conseruat. Inst. l. c.

§ 190. Not manifest theft is punished by the law of the Twelve Tables with double damages, which penalty the praetor has retained.

§ 191. Concepti et oblati poena ex lege XII tabularum tripli es*t*, *ea*que similiter a praetore seruatur.

§ 191. The penalty for the discovery or the introduction of stolen goods is by the law of the Twelve Tables triple damages, a penalty which the praetor has also retained.

§ 192. Prohibiti actio quadrupli est ex e*dicto* praetoris i*n*troducta; lex autem eo nomine nullam poen*am* constituit. hoc solum praec*i*pit, ut qui quaerere uelit, nudus quaerat, lic*i*o cinctus, lancem habens; qui si quid inuenerit, iubet id lex furtum manifestum ess*e*.

§ 192. Prevention of search renders liable to fourfold damages, a penalty which the edict of the praetor first ordained. The Twelve Tables inflicted no penalty for such an offence, but directed that the person wishing to search must be naked, only wearing a girdle, and carrying a platter in his hands; and if anything was thus discovered the law of the Twelve Tables declares it to be manifest theft.

§ 193. Quid sit autem lic*i*um, quaesitum est. sed uerius *est* consuti genus esse, quo necessariae partes tegeren*tur*. quae res [lex tota] ridicula est. nam qui uestitum quaerere p*r*ohibet, is et nudum quaerere prohibi*tur*us est, eo magis quod ita

§ 193. What the girdle was is doubted, but it seems to have been a covering for the loins. The whole of this enactment of the Twelve Tables is nugatory, for he who prevents a man from searching in his clothes would prevent him from searching naked,

quaesita r*e* ⟨*et*⟩ inuenta maiori poenae subiciatur. deinde quod lancem siue ideo haberi iubeat, ut manibus occup*a*tis nihil subiciat, siue ideo, ut quod inueneri*t* ibi inponat, neutrum eorum procedit, si id quod *quae*ratur, eius magnitudinis aut naturae sit, ut neque subici neque ib*i* inponi possit. certe non dubitatur, cuiuscumque materiae sit ea lanx, satis legi fieri.

especially as in such a search the finding of stolen goods would subject him to a heavier penalty. Besides, whether the platter is to be held by the searcher in order that his hands being engaged in holding it he may not bring anything into the house, or in order that what is found may be placed thereupon, neither of these reasons can be alleged when the thing searched for is of such a size or nature that it could not be brought into the house by hand, nor placed on the platter. It is not disputed that a platter of any material satisfies the requirement of the Tables.

§ 194. Propter hoc tamen, quod lex ex ea causa manifestum furtum esse iubet, sunt qui scribunt furtum manifestum aut lege ⟨*intellegi*⟩ aut natura: lege id ipsum de quo loquimur, natura illud de quo superius exposuimus. sed uerius est natura tantum manifestum furtum intellegi. neque enim lex facere potest, ut qui manifestus fur non si*t*, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter a*ut* homicida non sit, adulter uel homicida sit. at illud sane lex facere potest, ut proinde aliquis poena tenea*tur* atqu*e* si furtum uel adulterium uel homicidium admi*s*isset, quamuis nihil eorum admiserit.

§ 194. On account of the enactment that a discovery in such a search is manifest theft, some writers say that manifest theft is of two kinds, statutory or actual: statutory being that of which we have just been speaking, actual being that kind of manifest theft which has been previously explained. But in truth, the only mode of manifest theft is the actual one, for law cannot turn a not manifest thief into a manifest thief, any more than it can turn a man who is not a thief into a thief; or make an adulterer or homicide out of a man who has not killed or committed adultery. What a statute can accomplish is this, that a person shall be subject to a penalty just as if he had committed theft, adultery, or homicide, although he have not committed any of those offences.

§ 195. Furtum autem fit non solum cum quis intercipiendi caus*a* rem alienam *a*mouet, *sed* generaliter cum quis rem alienam inuito domino contrectat.

Inst. 4, 1, 6.

§ 195. Theft is not simply confined to the carrying away the property of another with intent of appropriation, but embraces any kind of physical handling of a thing belonging to another against the will of the owner.

§ 196. Itaque si quis r*e* quae apud eum deposita sit utatur, furtum committit. et si quis

§ 196. Thus, to use a thing committed to one's keeping as a deposit, or to put a thing that is

utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad ce*n*am inui*ta*turus, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius aliquo duxerit, quod ueteres scripserunt de eo qui in aciem perduxisset. Inst. l. c.

lent to one for use to a different use than that for which it was lent, is theft; to borrow plate, for instance, on the representation that the borrower is going to entertain his friends, and then to carry it away into the country; or to borrow a horse for a mere ride, and then to take it far away out of the neighbourhood; or, as in the case described by the old lawyers, to take it into battle.

§ 197. Placuit tamen eos, qui *re*bus commodatis aliter uterentur, quam u*t*endas accepissent, ita furtum committere, s*i i*ntellegant id se inuito domino facere, eumque, si intellexisset, non permissurum; *at* si permissurum cred*a*nt, extra furti crimen uideri; optima sane distinctio*ne*, quod furtum sine dolo malo non committitur. Inst. 4, 1, 7.

§ 197. It is held, however, that putting a thing lent for use to a different use than the lender contemplated is only theft if the borrower knows it to be contrary to the will of the owner, and that, if he had notice, he would refuse permission; but if he believes that the owner would give permission, it is not theft; and the distinction is just, for there is no theft without unlawful intention.

§ 198. Sed et si credat aliquis inuito domino se rem *con*trectare, domino autem uolente id fiat, dicitur furtum non fieri. unde illud quaesitum [et probatum] est, cum Titius seruum meum sollicit*a*u*e*r*i*t, ut quasdam res mihi subriperet et ad eum perferret, ⟨*et seruus*⟩ id ad me pertul*er*it, ego, dum uolo Titium in ipso delicto deprehendere permi*serim* se*r*uo quasdam res ad eum perferre, *u*trum furti an serui corrupt*i* iudicio tenea*tur* Titius mihi, an neutro. responsum neutro eum teneri, furti ideo quod non inuito me res contrecta*u*er*i*t, serui corrupti ideo qu*od* deterior seruus factus non est. Inst. 4, 1, 8.

§ 198. But even to deal with a thing in the belief that you are acting against the will of the owner, if the owner is in fact consenting to your doing so, is said not to amount to theft; whence a question arises, if Titius solicits my slave to steal my property, and convey it to him, and my slave informs me of it, and I, wishing to detect Titius in the act, permit my slave to carry my goods to him; it has been questioned whether either an action of theft or one for corrupting a slave can be maintained against Titius. The answer (responsum) is that neither action is maintainable; not the action of theft, because his dealing with my property was not an act done against my will; not the action for corrupting a slave, because the slave was not in fact corrupted.

§ 199. Interdum autem e*tiam* liberorum hominum furtum fit,

§ 199. Sometimes there may be a theft even of free persons;

ueluti si quis liberorum nostrorum qui in potestate nostra *sint*, siue etiam uxor quae in manu nostra sit, siue etiam iudicatus uel auctoratus meus subreptus *f*uer*it*. Inst. 4, 1, 9.

as, for instance, of a child in my power, of a wife in my hand, or even of my judgment debtor, or of my hired gladiator, should they be secretly removed from my control.

§ 200. Aliquando etiam *suae* rei quisque furtum committit, ueluti si debitor rem qua*m* credito*ri* pignori dedit subtraxerit, uel *si* bonae fidei possessori rem meam possidenti subripuerim. unde placuit eum, qui ser*u*um suum quem alius bona fide possidebat ad se reuersum celauerit, furtum committere. Inst. 4, 1, 10.

§ 200. A man may sometimes even steal his own property; as, for instance, a debtor who purloins the goods which he has pledged to a creditor, or an owner who surreptitiously takes away his own property from a bona fide possessor of it; and accordingly it has been held, that concealment by the owner of the fact of his slave having returned to him, from one who had possessed him in good faith, amounted to theft.

§ 201. Rursus ex diuerso in*ter*dum alienas res occupare et usucapere concessum est, nec creditur furtum fieri, ueluti res hereditarias, quarum heres non est nactus possessionem, nisi necessarius heres extet; nam necessario herede exta*n*te placuit nihil pro herede usucapi poss*e*. it*em* debitor rem, quam fiduciae causa creditori mancipauerit aut in iure cesserit, *secun*dum ea quae in superiore commentario rettulimus, sine furto possidere et usucapere potest.

§ 201. Conversely, property belonging to another may sometimes be seized and acquired by usucapion without committing theft; hereditaments, for instance, before an heir has obtained possession, except in the case of a necessary heir; for where there is a necessary heir it is settled law that no usucapion as quasi-heir is possible (2 § 58). Also a debtor, having conveyed property on trust to his creditor by mancipation or surrender before the magistrate, as I mentioned in the preceding book, may, without committing theft, repossess it and acquire new ownership thereof by usucapion (2 § 59).

§ 202. Interdum furti tenetur *qui* ipse furtum non fecerit, qualis est cuius ope consilio furtum factum est. in quo numero est qui nummos tibi excussit, ut eos alius subriperet, uel obstitit tibi, ut alius subriperet, aut oues aut boues tuas fugauit, ut alius eas exciperet. et hoc ueteres scripserunt de eo qu*i* panno rubro fugauit armen-

§ 202. In some cases theft may be chargeable on a person who is not the actual perpetrator, as on one, by whose aid and abetment a theft has been committed; to which class belongs the man who knocks out of your hand money for another to pick up, or stands in your way that another may snatch it, or scatters your sheep or oxen that another may steal them, like the man in the old

tum. sed si qui*d* per lasciuiam et non data opera, ut furtum committeretur, factum sit, uidebimus a*n* utilis a*ctio* d*a*ri debeat, cum per legem *A*quiliam quae de damno lata ⟨*est*⟩ etiam culpa puniatur. Inst. 4, 1, 11.	books, who waved a red cloth to frighten a herd. But if the same thing were done as a frolic, without the intention of committing a theft, we will consider whether a praetorian form of action (in extension of the lex Aquilia) may not be maintainable, since the Aquilian statute relating to damage makes even negligence penal.
§ 203. Furti autem a*ctio* ei conpetit cuius interest rem saluam esse, licet dominus non sit. itaque nec domino aliter conpetit, quam si e*i*us in*ter*sit rem non perire. Inst. 4, 1, 13.	§ 203. The action of theft is maintainable by the person interested in the preservation of the property, although he is not the owner; and so even the owner cannot maintain it unless he has an interest in the safety of the thing.
§ 204. Vnde constat creditorem de pignore subrepto furti agere posse; adeo quidem, ut qu*a*m*ui*s ipse dominus, id est ipse debitor, eam rem subripuerit, nihilo minus creditori conpetat actio furti. Inst. 4, 1, 14.	§ 204. Hence when a thing pledged is stolen, the creditor can bring it, so much so that he can even maintain it against the owner or debtor who surreptitiously takes away from him the thing he has pledged.
§ 205. Item si fullo polienda curandaue aut sarcinator sarcienda uestimenta mercede certa acceperit eaqu*e* furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil i*nter*est *e*a non periisse, cum iudicio locati a fullone aut sarcinatore suum *con*sequi pos*si*t, si modo is fullo aut sarci*na*tor re*i* praestand*ae* sufficiat; nam si soluendo non est, tunc quia ab eo dominus s*uu*m consequi non potest, ipsi furti actio conpetit, quia hoc casu ipsius interest rem saluam esse. Inst. 4, 1, 15.	§ 205. So if clothes are delivered to be cleaned or finished or mended for a certain remuneration, and then are stolen, the fuller or tailor has the action, and not the owner; for the owner is not interested in the loss, since he has his action on the contract of letting against the fuller or tailor to recover the value; supposing always, that the fuller or tailor has sufficient means to make the loss good. For if the latter is insolvent, then as the owner cannot recover what he has a right to claim from him, he can himself maintain the action of theft against the thief; because, in this hypothesis, he is interested in the loss of the property.
§ 206. *Quae de* fullone aut sarci*na*tore diximus, eadem transferemus et ad eum cui rem commodauimus. nam ut	§ 206. What has been said of the fuller and tailor applies to the borrower of a thing (commodatarius); for as on account of the payment

illi mercedem capiendo custodiam praestant, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare. Inst. 4, 1, 16.

the former receive they are made responsible for safe custody of the thing, so on account of the advantage the borrower derives from the use of the thing he is likewise made responsible for its safe custody.

§ 207. Sed is apud quem res deposita est custodiam non praestat tantumque in eo obnoxius est, si quid ipse dolo ⟨*malo*⟩ fecerit. qua de *causa* ⟨*si*⟩ res ei subrepta fuerit, qu*ia* restituendae eius n*omine* depositi non tenetur nec ob id eius interest rem saluam esse, furti [itaque] agere non potest, sed ea actio domino conpetit. Inst. 4, 1, 17.

§ 207. But as a depositary is not answerable for the safe custody of the thing deposited, being only liable for his own fraud, so, if the thing is stolen from him, being not compellable to make restitution by action of deposit, he is not interested in the thing being safe; and therefore cannot maintain the action of theft which is only maintainable by the owner of the thing.

§ 208. In summa sciendum est quaesitum esse, an inpubes rem alien*am am*ouendo furtum faciat. plerisque placet, quia furtum ex ad*f*ect*u* consistit, ita demum obligari eo crimine inpuberem, si proximus pubertati sit et ob id intellegat se delinquere. Inst. 4, 1, 19.

§ 208. Finally, it is a question whether if any one below the age of puberty takes the property of another, he commits a theft; and most jurists agree that as theft depends on intention, one below the age of puberty is not able to be charged with it unless, being near to that age, he understands that he is committing a delict.

Theft in modern systems of jurisprudence is a crime, that is, belongs to the penal or criminal code. In Roman law, as in other early systems, it is a private injury, and treated as a subject of the civil code. This was recognized by the law of the Twelve Tables, which established the penalty for furtum nec manifestum, § 190, and allowed a compromise or composition for theft, that is, allowed the penalty thereby engendered to be extinguished by private agreement between the party wronged and the wrongdoer.

§ 184. Aulus Gellius gives a fragment of Sabinus which combines the first and third definition of furtum manifestum. Manifestum autem furtum est, ut ait Masurius, quod deprehenditur dum fit. Faciendi finis est, cum perlatum est quo ferri coeperat, 9, 18, 1. 'Manifest theft is that which is detected in the act. The act is finished when the removal of the goods to the place intended is completed.' Justinian confirms the third definition, Inst. 4, 1, 3.

§ 189. The reason why furtum manifestum was subjected to a heavier penalty than furtum nec manifestum was not because the

barbarous legislator supposed that detection in the act was an aggravation of the offence, but because he wished, by the amplitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender, particularly as it was lawful to kill a nocturnal thief, or one who during the day defended himself with a weapon, Gell. 11, 18, 6, 7. In the infancy of society it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both lawgiver and judge.

That such was really the motive of the legislator we have historic evidence in the declaration of Rotharis, ruler of the Langobards, A. D. 643. He gives the relatives of the slain their election between the primitive vengeance for blood (feud or vendetta) and a composition or pecuniary fine (wergeld or poena) to be recovered by action before the public tribunals. He says that he fixes a high fine in order to induce plaintiffs to forgo their right of feud; and implies that he would gladly have abolished the right of feud or private war, but felt that it was too deeply rooted in the habits of his tribe to be extirpated by legislation. Bethmann-Hollweg, Der Germ. Civ. Process, § 60.

This writer supposes, Der Röm. C. P., § 96, that the praetorian action Furti manifesti had a Fictitious formula, 4 § 32, and suggests the following:

Demonstratio: Quod Numerius Negidius Aulo Agerio furtum manifestum fecit paterae aureae,

Fictio: Si ob eam rem Numerium Negidium ex lege verberari itemque Aulo Agerio addici oporteret,

Condemnatio: Quanti ea res fuit, tantae pecuniae, judex, Numerium Negidium Aulo Agerio quadruplum condemnato: Si non paret, absolvito.

According to Gellius a slave after having been scourged was thrown from the Tarpeian rock, and some writers think that Gaius stated this fact in the above passage.

§ 193. We must distinguish between furtum conceptum with its threefold penalty, § 191, and furtum lance et licio conceptum. Ea quoque furta quae per lancem liciumque concepta essent, proinde ac si manifesta forent, vindicaverunt, Gellius, 11, 18, 9. 'Possession of stolen goods discovered on search with the platter and girdle was punished as theft detected in the act.' Cf. Inst. 4, 1, 4.

Traces of the word 'conceptum' occur in a fragment of the Twelve Tables, vi, 7: Tignum junctum aedibus vineave et concapit ne solvito, 'Timber built into a house or vineyard of another man and discovered there by the owner must not be severed:' where et

concapit represents either et conceptum or qui concipiet. (On the grammatical form—conceptum—see Roby 2, p. 215, n. 1.)

The search with a platter and girdle was probably a custom derived from Greece, for a similar formality is described by Plato, Leges, 12, 7.

In the later period of Roman law, as in modern Europe, the search for stolen goods was not conducted by the private party, but by public officers. In England the object is effected by a search warrant. Upon the information on oath that a party has probable cause to suspect that his goods have been stolen, and are concealed in a certain dwelling-house, and on his showing the cause of his suspicion, a justice of the peace may grant a warrant authorizing to enter and search for the said goods, and to attach the goods and the party in whose custody they are found, and bring them before him, that he may give an account how he came by them, and be dealt with according to law. The warrant is directed to a constable or other public officer and not to any private person, though it is proper that the party complaining should be present as assistant because he knows his goods. As touching the party that had custody of the goods, if they were stolen, but not by him but by another that sold and delivered them to him (furtum oblatum), if it appear that he was ignorant that they were stolen, he may be discharged as an offender and bound over to give evidence as a witness against him that sold them.

§ 195. The same definition of theft is given by Paulus. Fur est qui dolo malo rem alienam contrectat, Sent. R. 2, 31, 1. 'A thief is he who with evil intention handles (lifts, moves, touches) the property of another.' Justinian gives a different definition. Furtum est contrectatio rei fraudulosa, lucri faciendi causa vel ipsius rei, vel etiam usus ejus possessionisve, Inst. 4, 1, 1. 'Theft is the fraudulent handling of a thing with the object of acquiring gain either from the thing itself or from its use, or from possession of it.'

It may be observed that Justinian does not say with Paulus, rei alienae, because a man may steal his own property, as when a pledgor steals from a pledgee or an owner from a usufructuary. So, by English law, to take a man's own goods out of the hands of a bailee, if the taking have the effect of charging the bailee, is larceny. The usus of a thing is stolen when the owner deprives the usufructuary of it, or when a pledgee unlawfully uses a pledge. Si creditor pignore utatur, furtum committit, Inst. 4, 1, 6.

Cases of Possessio being appropriated are when a thing pledged is taken out of the pledgee's possession by the owner, or when an owner of a thing surreptitiously deprives the bona fide possessor of his possession, § 200, for though such possessor has no title to the thing, his possession is recognized, till he is evicted, and he may have claims against the owner on account of impensae and on other grounds.

In English law larceny is defined to be the unlawful taking and carrying away of things personal (asportatio) with intent to deprive the right owner of the same and to make them the property of the taker. To constitute larceny the original taking of possession must be unlawful: therefore, if the owner deliver his property to a person to hold for him, the subsequent appropriation of it by the latter, though an offence and a breach of faith, is not larceny, because the original taking was lawful. But it is larceny if the delivery was obtained by fraud, i. e. with an original design and pre-arranged plan to deprive the owner of his property and convert it to the use of the taker. The possession is then unlawful in its inception. Again, if delivery does not divest the owner of the legal possession, appropriation by the taker constitutes possession unlawful in its inception and so is larceny. In this respect a servant (e. g. a shepherd, carter, porter, butler, clerk) is to be distinguished from a bailee, for the servant is regarded as not possessing, but merely as the instrument of the owner's possession, and so he may be guilty of larceny of the thing. (See Pollock and Wright, Possession in the Common Law, Pt. III.)

Roman law, however, did not require an unlawful inception of possession for constituting furtum, as is shown by the fact that the pledgee, who has lawful possession, is guilty of theft, if he make use of the pledge. Had it done so, however, the appropriation of the owner's property by commodatarius, depositarius, or conductor rei would have constituted an unlawful inception of possession and so have been furtum, since Roman law, differing in this respect from English, does not as a rule transfer possession to such bailees but only detention. But as a matter of fact in Roman law the question whether a person guilty of 'contrectatio rei fraudulosa' had or had not been in previous possession of the thing was never entertained (cf. Stephen, Hist. of Criminal Law in England, 1, p. 30, &c.).

§ 198. Justinian decided that the attempt to corrupt a slave was as criminal as his actual corruption, and made the offender liable to be sued for theft and for corrupting a slave, Inst. 4, 1, 8.

§ 201. Usucapion of the property of a voluntary heir, and usureceptio, or usucapion of the property of a mortgagee, have been mentioned in the preceding book. See 2 §§ 52-60.

§ 202. A person who is present aiding and abetting when an offence is committed but is not the actual perpetrator is called, in English law, a principal in the second degree. He who procures or abets another to commit an offence but is absent at the time of the commission is called an accessory before the fact. Their punishment is usually the same as that of the principal in the first degree. An accessory after the fact is one who, knowing an offence to have been committed by another, receives, harbours, or assists the offender. For an ex-

planation of the distinction between actio legis aquiliae directa and utilis see § 219, comm.

§ 203. When a sale is complete, property does not, by Roman law, pass to the vendee before delivery, although the thing sold is forthwith at the risk of the vendee. If it is stolen before delivery, in spite of the rule that the action of theft is maintainable by the person interested, the vendee cannot sue in his own name, but the vendor is compellable to cede his actions and the vendee sues in the name of the vendor, Dig. 47, 2, 14, 1. But a person who is neither owner, nor has any real right in the thing may, as we have seen, have sufficient interest to enable him to maintain actio furti, though a person could not under these circumstances make use of the condictio furtiva.

The quadruple and double damages for furtum manifestum and nec manifestum were purely penal. The owner could further recover the thing stolen by a real action (vindicatio), maintainable against any one in possession of the stolen property, or damages in a personal action (condictio furtiva), Inst. 4, 1, 20. The granting of a personal action in this case, with an intentio declaring that the thief was bound to convey the property (dare oportere), was anomalous, because the property of the thing stolen was not in the thief but in the owner, and so could not be conveyed to the latter, 4 § 4.

If the thing stolen had been destroyed, or if, being money, it had been spent or mixed with money of the thief, the property of the plaintiff would have been in fact extinguished and condictio would be a suitable action. If the property existed in the hands of the thief or could be traced, vindicatio would be maintainable. The object of the law in allowing the plaintiff in any case to sue by condictio was to relieve him from the necessity of ascertaining whether his property was safe or had been consumed. If we ask why, instead of using the intentio, Si paret dare oportere, 4 § 4, which might be inconsistent with the truth, the plaintiff did not use the formula, Quidquid paret dare facere oportere, which, as including compensation or simple restitution of possession, would always be consistent with truth; the answer is probably what Savigny has suggested, namely, the intention of the legislator to subject the defendant to the sponsio poenalis, the additional forfeiture of a third of the sum in litigation. It is true that this is only mentioned as incidental to a condictio for pecunia certa credita, 4 § 171, but the penalty may have also been recoverable in a claim for certain money stolen (condictio furtiva).

According to Lenel, p. 263, the following would be the kind of formula for the actio furti nec manifesti:

Si paret Aulo Agerio a Numerio Negidio, opeve consilio Numerii Negidii, furtum factum esse paterae aureae;

Quam ob rem Numerium Negidium pro fure damnum decidere oportet,
Quanti ea res fuit, cum furtum est, tantae pecuniae duplum judex Numerium Negidium Aulo Agerio condemna: si non paret absolve.

The plaintiff in theft had in the later period of Roman law the option of proceeding by civil action or by criminal prosecution, and Ulpian informs us that the latter was the usual course, Dig. 47, 2, 93.

§ 209. Qui res alienas rapit, tenetur et*iam* furti. quis enim magis alienam rem inuito domino *con*trectat quam qui ⟨*ui*⟩ rapit? itaque recte *dict*um est eum inprobum furem esse. sed propriam actione*m* eius de*li*cti nom*ine* praetor introduxit, quae appellatur ui bonorum raptorum, et est intra annum qu*a*drupli [actio], post annum simpli. quae actio utilis est, *e*tsi quis un*a*m rem, licet minimam, rapuerit.
Inst. 4, 2, pr.

§ 209. Rapine or robbery is chargeable as theft, for who more handles the property of another against the will of the owner than the robber? who has been well denominated a shameless thief. However, as a special remedy for this offence the praetor has introduced the action for rapine with violence; which may be brought within a year for four times the value, after a year for simple damages; and which lies when only a single thing of the slightest value has been taken with violence.

Keller, der Röm. Civil Process, § 33, cf. Lenel, p. 314, gives the following formula: Recuperatores sunto: Quantae pecuniae paret dolo malo Numerii Negidii vi hominibus armatis coactisve damnum datum esse Aulo Agerio bonave rapta, dumtaxat sestertium tot millium, tantae pecuniae quadruplum, Recuperatores, Numerium Negidium Aulo Agerio condemnate: si non paret, absolvite. The party aggrieved might either proceed by civil action or by criminal prosecution under the lex Julia de vi publica et privata. This law, enacted either by Augustus or by Julius Caesar, made the criminal guilty of public or armed violence, liable to deportation; the criminal guilty of private or unarmed violence, to confiscation of a third of his goods, Inst. 4, 18, 8.

The quadruple damages in the action of rapine were not purely penal as in the action of furtum manifestum, but included the restitution of the property or its value, a rule which was definitely settled subsequently to the time of Gaius, see 4, 8, and cf. Inst. Just. 4, 2, pr. The penal damages for rapine were therefore only three times the value of the goods plundered, that is, less than the damages in furtum manifestum. If, however, the robber was taken in the act, he was chargeable, as Gaius explains, with furtum manifestum.

The lex Cornelia repetundarum passed by the dictator Sylla, B.C. 82, instituting a criminal action against governors of provinces guilty of

extortion: the formula Octaviana or actio quod Metus causa, introduced by the praetor Octavius, father of Augustus, B.C. 79: and the actio Vi bonorum raptorum, introduced by the praetor Lucullus, B.C. 77, all fall within the space of four years and indicate the lawlessness generated by the civil wars in the time of Sylla.

Robbery, like theft, requires dolus malus, that is, criminal intention. If then a man, believing himself to be rightful owner, violently seized movable goods, he was not guilty of robbery, Inst. 4, 2, 1; but, by a constitution of the emperors Valentinian, Theodosius, and Arcadius, enacted A.D. 389, in order to repress violence, and deter people from taking the law into their own hands, a person who violently seized either movable or immovable property, if rightful owner, forfeited the property to the person dispossessed; if not rightful owner, was condemned, besides restitution of possession, to forfeit the value of the property, Cod. 8, 4, 7. This constitution increased the civil penalty recoverable for violent dispossession of land by the interdict unde vi, 4 §§ 154, 155. The interdict unde vi could not originally be maintained for violent, but unarmed, dispossession if the person evicted had himself acquired possession from the evictor by an origin, violent, clandestine, or permissive, unless the evictor had come armed with weapons of offence: and for either armed or unarmed dispossession the liability, as far as the property in question was concerned, was only restitution of possession. By the constitution of the three emperors the civil penalty of all violent disseisin was loss not only of possession but of ownership; and subsequently to this constitution, the interdict unde vi ceased to make a distinction between armed and unarmed dispossession.

This constitution may be regarded as the final blow struck by the Roman legislator at the archaic form of remedial procedure—private violence or self-redress. In archaic society, if society it could be called, before the establishment of central authority, public tribunals, and police or executive functionaries, such was the only possible means of redress; and such redress was recognized and permitted by primeval law, if the sentiments of the tribe at such a period can be called by the name of law.

Among the German races the disorder implied by the toleration of Feud or private war was gradually mitigated by the introduction of certain Truces, or temporary or local Peaces: the Truce of the King, prohibiting private war within the precincts of the royal residence: the Truce of the Church, giving to the fugitive wrongdoer an asylum in the sanctuary: the Truce of the Assembly, excluding the prosecution of feuds from the place where the Hundred was assembled: and the Truce of the Town, Village, or House, protecting the offender from homicidal attack within these limits.

At some period, too, society interposed and offered to act as arbitrator, and to procure for the aggrieved party satisfaction of the wrong he had endured. Accordingly all injuries were rated at a certain tariff, and a person who had suffered aggression had the option whether he should avenge himself or, in commutation of his right of Feud, accept the fine fixed by this tariff, and awarded by a tribunal of his countrymen. This mediation of the community, which the plaintiff could accept or decline at his discretion, was the origin of actiones poenales, the poena being the inducement offered to the plaintiff to make him adopt the more peaceful course. In Saxon law the alternative offered to the aggressor was expressed by the maxim Biege spere of side other bere: 'Buy the spear off the side or bear it': i.e. make atonement or be liable to Feud. (Kemble.)

Finally the Peace of the King, proclaimed at each coronation, became universal: the state undertook the decision and composition of all quarrels; and private war at all times and in all places was interdicted and superseded by recourse to the public judicature.

§ 210. Damni iniuriae actio constituit*ur* per legem Aquiliam, cuius primo capite cautum est, ⟨*ut*⟩ si quis hominem alienum *alien*amue quadrupedem qua*e* *p*ecudum numero sit iniuria occiderit, quanti ea res in eo anno plurimi fu*er*it, tantum domino dare damnetur. Inst. 4, 3, pr.

§ 210. Damage unlawfully caused is actionable under the lex Aquilia, whose first chapter provides, that if a slave of another man, or a quadruped of his cattle, be unlawfully slain, whatever within a year was the highest value thereof, that amount the offender shall pay to the owner.

§ 211. *I*niuria autem occidere intellegitur, cuius dolo *au*t culpa id acciderit; nec ulla alia lege damnum, quod sine iniuria dat*ur*, reprehendit*ur*; itaque inpunitus est, qui sine culpa et dolo malo casu quodam damnum committit. Inst. 4, 3, 3.

§ 211. Unlawful slaying means slaying by intention or negligence; loss occasioned by no fault of the person committing it being punished by no law; hence a person who damages another accidentally and not wilfully or negligently does so with impunity.

§ 212. Nec solum corpus in actione huius legis aestimatur; sed sane *s*i seruo occiso plus dominus capiat damni quam pretium serui *sit*, id quoque aestimatur, ueluti si seruus meus ab aliquo heres institutus, antequam iussu meo hereditatem cerneret, occis*us* fuerit;

§ 212. It is not only the body of the slave or animal slain that is appraised in the action under this statute, but if the killing of a slave occasion to the owner the loss of anything in addition to his price, this loss is also appraised; for instance, if my slave has been instituted somebody's heir, and

non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. item si ex gemellis uel ex comoedis uel ex sy*m*p*h*oniacis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius ⟨*id*⟩ qu*oque* conputat*ur*, quod ceteri qui supersunt dep*re*tiati *sunt*. idem iuris est etiam si ex pari mularum unam uel etiam ex quadrigis equorum unum occiderit. Inst. 4, 3, 10.

before by my order he has signified his acceptance, he is slain, valuation is made not only of his body but also of the inheritance I have missed; or if one of two twins, or one of a company of players, or one of a band of musicians is slain, an estimate is made not only of his value but also of the extent to which the remainder are depreciated. The same holds if one of a pair of mules, or one of a team of four chariot horses is killed.

§ 213. Cuius autem seruus occisus est, is liberum arbitrium habet uel capitali crimine reum facere eum qui occiderit, uel hac lege damnum persequi. Inst. 4, 3, 11.

§ 213. The owner whose slave is killed has the option of prosecuting the homicide for a capital crime or of suing him under this statute for damages.

§ 214. Quod autem adi*ec*tum est in hac lege QVANTI IN EO ANNO PLVRIMI EA RES FVERIT, illud efficit, si clodum puta aut luscum seruum occiderit, qui in eo anno integer ⟨*fuerit, ut non quanti fuerit, cum occideretur, sed quanti in eo anno plurimi*⟩ fu*er*it, aestimatio fiat; quo fit, ut quis plus in*ter*dum *con*sequatur quam ei damnum datum est. Inst. 4, 3, 9.

§ 214. From the words of this statute, 'Whatever within a year was the highest value thereof,' it follows that if the slave killed was lame or blind of one eye, but had been sound within a year, the owner will recover not simply his value at the time of his death but his highest value within a year, the result being that a plaintiff will in some cases recover more than the amount of the loss he has sustained.

§ 215. Capite secundo ⟨*aduersus*⟩ adstipulatorem, qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res e*st*, ta*n*ti actio constituitur. Inst. 4, 3, 12.

§ 215. By the second chapter an adstipulator who defrauds a principal stipulator by releasing the promissor can be sued for the amount of the loss occasioned.

§ 216. Qu*a* et ipsa parte legis damni nomine actionem introduci m*anifes*tum est. sed id caueri non fuit necessarium, cum actio man*d*ati ad eam rem sufficeret; nisi quod ea lege aduersus infitiantem in duplum agitur.

§ 216. It is evident that in this part of the statute also an action was instituted on account of damage to property, though here the provision was not absolutely necessary, because the action of Mandate would give a sufficient remedy, except for this that the lex Aquilia, when the action is defended, gives double damages.

§ 217. Capite tertio de omni

§ 217. The third chapter makes

cetero damno cauet*ur*. itaque si quis seruum uel eam quadrupedem quae pecudum ⟨*numero est uulnerauerit, siue eam quadrupedem quae pecudum*⟩ numero *non est*, ueluti canem, aut feram bestiam, uel*uti* ursum leonem, uulnerauerit uel occiderit, *h*oc capite actio constituit*ur*. in ceteris quoque animalibus, item in omnibus rebus qua*e* anima carent damnum iniuria datum hac parte uindicatur. si quid enim ustum aut ruptum aut fractum ⟨*fuerit*⟩, actio hoc capite constituit*ur*, qu*am*qu*am* potuerit sola rupti appellatio in omnes istas causas sufficere; ruptum ⟨*enim intellegitur quod quoquo modo corruptum*⟩ est. unde non solum usta [aut rupta] aut fracta, sed et*iam* scissa et conlisa et effusa et quoquo modo uitiata aut perempta atque deteriora facta hoc uerbo continentur. Inst. 4, 3, 13.

provision for all other damage. Therefore if a slave, or a quadruped included under the name of cattle, is wounded, or if a quadruped not included under the name of cattle, as a dog, or a wild beast, for instance, or a bear or lion, is wounded or is killed, in this chapter an action is provided: so too if other animals or any things inanimate are unlawfully damaged, this part of the statute supplies a remedy, since in this chapter an action is expressly established in case of anything burnt, broken in pieces, fractured: although the single word 'broken' (ruptum) will suffice to cover all these offences, for the word 'broken' (ruptum) is interpreted to mean injured in any way (corruptum quoquo modo); hence not only burning, breaking, crushing, but any cutting, bruising, spilling, vitiating in any way, destroying, or deteriorating, is hereby comprehended.

§ 218. Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proxim*is* ea res fuerit, damnat*ur* is qui damnum dederit. ac ne PLVRIMI quidem uerbum adicitur. et ideo quidam *p*utauerunt liberum esse iudici u*el* ad id tempus ex diebus XXX aestimationem redigere, quo plurimi res fu*er*it, uel ad id qu*o* minoris fu*er*it. sed Sabino placuit *pr*oinde habendum, ac *si* et*iam* hac parte PLVRIM*I* uerbum adiectum esset; nam leg*is* latorem contentum fuisse, ⟨*quod prima parte eo uerbo usus esset.*

Inst. 4, 3, 14.

§ 218. We should notice that in this chapter it is not the value which the thing had within a year, but which it had within the last thirty days, that is chargeable on the person causing the damage, though the statute itself does not expressly mention the term highest value (plurimi). Hence some of the other school have held that it was left to the discretion of the judex whether the damages should be measured by the highest value or by any lower value which the thing may have had within the last thirty days: but Sabinus held that the law must be interpreted as if it contained the word 'highest' (plurimi), the legislator having thought it sufficient to use this word in the first chapter.

§ 219. *Ceterum*⟩ placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit; *ideo*que alio modo damno dato utiles actiones dan*tur*, ueluti si quis alienum hominem a*ut* pecudem incluserit et *f*ame necauerit, aut iumentum tam uehementer egerit, ut rump*e*re*tur*; item si quis alieno seruo persuaserit, ut in arborem ascenderet uel in puteum descenderet, et *is* ascendendo aut descendendo ceciderit ⟨*et*⟩ aut mortuus fuerit aut aliqua parte corporis laesus sit; *sed* si quis alienum seruum de ponte a*ut* ripa in flumen proiecerit et is suffocatus fuerit, corpore suo damnum dediss*e* eo quod proiecerit non difficiliter intellegi potest.
Inst. 4, 3, 16.

§ 219. It has been held that an action under this statute only lies when the body of the offender is the instrument of mischief; and therefore for any other mode of occasioning loss praetorian actions (actiones utiles) must be brought: for instance, if a slave or quadruped is shut up and starved to death, or a horse is foundered by hard driving, or a slave is persuaded to climb a tree or descend a well, and in climbing or descending falls and is killed or hurt. But if a slave is pushed off a bridge or bank into a river and there drowned, the body of the person by pushing him may fairly be held to have caused his death.

§ 210. The lex Aquilia was a plebiscite carried by a tribune called Aquilius, according to Theophilus, at one of the secessions of the plebs, probably at the secession to the Janiculum, B.C. 287, on which same occasion the lex Hortensia was carried, making the plebiscites binding on the patricians. (See Grueber, Lex Aquilia, p. 183.)

The words of the first clause are preserved in the Digest: Qui servum servamve alienum alienamve quadrupedem vel pecudem injuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto, Gaius in Dig. 9, 2, 2, pr. 'If a slave, male or female, of another person, or a quadruped of his cattle is unlawfully slain, whatever was the highest value it bore in the previous year, such sum the slayer shall be condemned to pay to the owner.' Cattle are animals that feed in flocks or herds, and include horses, mules, asses, oxen, sheep, goats, and swine, Dig. l. c. 2.

§ 212. The words Quanti ea res est, erit, or fuit occur in the condemnatio or last part of a formula when a defendant is bound to indemnify a plaintiff, that is, to pay him a certain value. These words have two meanings: they mean either (1) the value of a thing to the world in general, i. e. its selling value or market value, called verum rei pretium, or vera rei aestimatio; or (2) its value to this particular plaintiff, id quod interest actoris, or utilitas actoris; a value which might be either less or greater than the

market value. Early law does not include more than the market value of the thing, but in course of time a wider view is taken of the plaintiff's interest (Grueber, Lex Aquilia, p. 265).

Where a claim is founded on some kinds of contract, say a contract of insurance against some kind of loss, the market value of the thing lost is generally intended, though this of course depends on the nature and terms of such contract; in this case the loss of the plaintiff does not include the damages he has indirectly experienced (damnum indirectum) nor the gain he has failed to realize (lucrum cessans). When a claim of indemnification is founded on delict or on breach of a contract, if this is not contrary to the intention of the parties, the plaintiff's interest is the measure of the indemnity to be paid, and includes not only the immediate damage that he has suffered, but also the mediate, when it was certain and capable of being foreseen; and not only the positive loss which he has suffered but also the gain which he has been hindered from realizing. If a creditor has been kept out of a sum of money, he will at least be entitled to the current rate of interest: but this is not the limit of his claim, if he can prove that the current rate of interest is insufficient to cover the specific disadvantage he has suffered from the Mora of his debtor.

The plaintiff's interest is the measure of the damages he recovers by the Interdicts Uti possidetis, Utrubi, and Unde vi; as it is in all actions founded on delinquency. The actio vi bonorum raptorum, however, is one of the exceptions to the rule. Here, in consequence, probably, of the peculiar wording of the edict, the measure of damages, the simplum or unit to be quadrupled, is not the plaintiff's interest but the market value, Dig. 47, 8, 2, 13, Savigny, System, Appendix 12.

Instances of indirect damages due to the act or omission of a defendant, are: the depreciation of the remaining horses of a team when one has been killed: the penal sum which a plaintiff is liable to pay from inability to fulfil another engagement in consequence of the default of the defendant: the sale of goods mortgaged by the plaintiff as security for another engagement which he cannot fulfil in consequence of the default of the defendant: the downfall of a house in consequence of the rottenness of the timber supplied by the defendant: the infection and extermination of a whole herd of cattle in consequence of a diseased beast being sold by the defendant.

Although in respect of computation of damages claims of indemnity founded on breach of contract, whether in consequence of dolus or culpa, may stand on the same footing as claims founded on delict; yet an important distinction was introduced by Justinian, who enacted that in the former case the damages recoverable by this computation of lucrum cessans and damnum indirectum should not exceed the

double of the immediate value, hoc quod interest dupli quantitatem minime excedere, Cod. 7, 47 ; but left claims founded on delict without any similar limitation. In claims founded on breach of contract we may distinguish two obligations : the primary obligation as defined by the promise of the contractor, the secondary or sanctioning obligation produced by the non-fulfilment of the promise. According to the nature of the contract, this non-fulfilment will be either the non-performance of some service ; or the non-delivery of some goods, movable or immovable ; or non-delivery at the covenanted time or covenanted place ; or negligent custody and consequent deterioration or destruction of some article deposited by the plaintiff ; or eviction of the plaintiff from some property transferred to him by the defendant ; or any other omission or non-feasance. The secondary obligation of a defendant may be divided into two portions, one corresponding to the immediate value to the plaintiff of the fulfilment of the primary obligation, the other corresponding to his mediate or indirect losses occasioned by its non-fulfilment. The first portion may be regarded as principal, the second as accessory. Similarly the active obligation or claim of the plaintiff may be divided into two parts, principal and accessory. By the enactment of Justinian, in an action founded on contract, the accessory claim can never exceed the principal, or, in other words, the total claim of the plaintiff can never exceed in amount twice the value of his principal claim. In obligations arising from delict there is no primary obligation or principal claim capable of furnishing a corresponding unit of measurement. The primary obligation of the defendant is here a necessity of abstention which is not called by the Romans obligatio : and the primary right of the plaintiff is a real right, a right against all the world to freedom from molestation ; which real right is not so definite or capable of exact valuation or appreciation as a personal claim. Accordingly the sanctioning right of the plaintiff in this case is left by Justinian without limitation or maximum ; and the judex is directed to assess the amount of whatever damage the plaintiff has actually incurred.

The enactment of Justinian was probably suggested by the stipulatio duplae annexed to contracts of sale, whereby in case of eviction the purchaser was entitled to recover from the vendor twice the purchase-money. Vangerow, § 571.

§ 213. The owner of a murdered slave both had a civil remedy by the lex Aquilia, and could prosecute criminally under the lex Cornelia de sicariis, passed in the dictatorship of Sylla, B. C. 82.

§ 215. The lex Aquilia, like many other Roman laws, combined heterogeneous dispositions. The first and third chapters contain remedies for destruction of property, or jus in rem, that is, the

injury of what is called in English law a chose in possession; the second chapter contains a remedy for the destruction of an obligation, or jus in personam, that is, the injury of what is called in English law a chose in action. The power of one promisee, the adstipulator, to extinguish by acceptilation the right of the other promisee, the principal stipulator, was a consequence of their Correality, § 110, comm. The remedy of the stipulator against the adstipulator, mentioned in the text, by actio mandati would not have been in existence at the time when the lex Aquilia was enacted.

§ 217. The terms of the third chapter are preserved in the Digest: Ceterarum rerum, praeter hominem et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit injuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto, Ulpian in Dig. 9, 2, 27 § 5. 'For property, other than slave or cattle slain, damaged by burning, breaking, crushing, unlawfully, the value it bore in the thirty days preceding the offender shall be condemned to pay to the owner.' The general meaning which the jurists gave to the word 'ruptum' is an early example of extensive interpretation.

§ 219. An action founded on the text of a law was called actio directa, an action not founded on the very text of the law, but granted by the praetor in the exercise of his judicial authority in circumstances which, though different, are similar to those which founded the direct action, was called actio utilis. The direct Aquilian action could only be brought by the owner (dominus) and when damage was immediately caused by a body to a body. If the damage was not caused by a body, or not by immediate contact, only the actio utilis could be brought. An actio utilis was brought in the following cases:

(1) When the Aquilian remedy was given to a person who was not owner but who had a jus in re aliena or was bonae fidei possessor.

(2) If the damage was not caused by a body, that is, not by immediate physical contact (damnum not corpore but only corpori datum).

(3) In a case of damage where neither the agent nor the patient was a body, i. e. physically affected (damnum neither corpore nor corpori datum).

(4) In a case of injury to a freeman.

There were three varieties of actio utilis:

(1) actio ficticia, 4 §§ 34–38;

(2) actions in which there was a variation in the persons named in the condemnatio from those previously named in the intentio, as in formula Rutiliana, 4 § 35;

(3) actio in factum concepta, 4 §§ 45–47.

It is probable that the utilis actio legis Aquiliae was generally in

the form of actio in factum concepta, though the actio ficticia in jus concepta was sometimes used. Cf. 4 § 37.'

The statement in the corresponding passage of the Institutes (4, 3, 16) that the actio in factum is to be distinguished from the actio utilis legis Aquiliae is probably erroneous. There is no trace of such a distinction in Gaius, and in the Digest the term actio in factum is used in all cases of extension of the statute. It is to be remembered that at the time of the compilation of the Institutes the formulary procedure, to which the terms actio utilis and actio in factum refer, had long ceased to be the practice. (Grueber, Lex Aquilia, pp. 199–208.)

The mode of growth of Roman law and the relation between directa Aquilia and utilis Aquilia may be illustrated by similar phenomena in English law, and the relation between the two forms of action called Trespass and Trespass on the Case. Trespass, which lies for injury to real or personal property or to the person, accompanied with violence, has a more extensive application than directa Aquilia, but viewed only as redressing injuries to personal property, is nearly coextensive in its range. The original scheme of actions, devised in comparatively barbarous times, contained no remedy for injuries where there is no act done but only a culpable omission, or where the act is not immediately injurious, but only by consequence or collaterally, or where the idea of force is inapplicable because the subject-matter is not corporeal or tangible, although the injury may be by act direct and immediate in its operation. To supply such deficiencies the statute of Westminster, 13 Edward I, had directed the clerks in chancery to frame new writs whenever the old scheme of writs contained no remedy for a wrong resembling in its features other wrongs for which a remedy was provided. Accordingly, a new writ of Trespass on the Case was framed upon the analogy of the old form of Trespass (confer, ad exemplum institoriae, § 162, comm.), applying to cases where the injury is not immediate, or the subject affected is not corporeal, or the agency is not bodily force. What Edward I directed to be done by the clerks in chancery, and what was done by the introduction of the action of Trespass on the Case, was exactly analogous to what the praetors did when, in virtue of their magisterial authority, they supplemented the civil law by the introduction of actiones ficticiae and actiones in factum. In respect of torts to personal property, the latter have nearly the same sphere as Trespass on the Case. The innovations of the praetor, however, were not confined to the region of torts to personal property, but pervaded every sphere and constituted a mass of supplementary law (jus praetorium), having to the remainder of the law (jus civile) somewhat similar relations and proportions to those which equity has to common law in English jurisprudence.

All attempts to reconstruct the formula in an action for damages under the lex Aquilia are to be regarded as highly conjectural. Lenel, Das Edictum Perpetuum, p. 158, suggests the following as a possible formula, when the action was brought adversus infitiantem in duplum, see § 216, 4 § 9. Si paret Numerium Negidium illum servum injuria occidisse, quam ob rem, quanti is servus in eo anno plurimi fuit, tantam pecuniam Numerium Negidium Aulo Agerio dare oportet, tantae pecuniae duplum, judex, Numerium Negidium Aulo Agerio condemna: si non paret, absolve. The actio confessoria may, according to Lenel, have contained the following demonstratio—quod ille servus occisus est, quem Numerius Negidius injuria se occidisse fassus est.

§ 220. Iniuria autem committit*ur* non solum cum quis pugno puta aut fuste percussus uel etiam *uer*beratus erit, sed et*iam* si cui conuicium factum fuerit, siue quis bona alicuius quasi debitoris sciens eum nihil sibi debere proscripserit, siue quis ad infamiam alicuius libellum aut carmen scripserit, siue quis matrem familias aut praetextatum adsectatus fuerit, et denique aliis pluribus modis. Inst. 4, 4, 1.

§ 220. Outrage is committed not only by striking with the fist or a stick or a whip, but by scandalous vociferation, or, though knowing that nothing is due to him, seizing and advertising for sale under an order of the praetor the goods of a person as if he were an insolvent or an absconding debtor, or by writing defamatory prose or verse, or by constantly following a matron or youth wearing the praetexta, and by many other modes.

§ 221. *P*ati *autem* iniuriam uidemur non solum per nosmet ipsos, sed et*iam* per liberos nostros quos in potestate habemus; item per uxores nostras, *quamuis* in manu nostra ⟨*non*⟩ sint. itaque si *f*iliae meae quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, uerum etiam meo quoque et Titii nomin*e*. Inst. 4, 4, 2.

§ 221. Outrage may be suffered not only in one's own person, but also in the person of a child in our power, or of a wife though not in our hand. So that if you insult my daughter who is married to Titius, but has not passed out of my power into his hand, you are suable for outrage, not only in her name, but also in my name, and in the name of her husband.

§ 222. Seruo autem ipsi qu*id*e*m* nulla iniuria intellegit*ur* fieri, sed domino per eum fieri uidetur; non tamen isdem modis, quibus etiam per liberos nostros uel uxores iniuriam pati uidemur, sed ita cum quid atrocius commissum

§ 222. A slave cannot be outraged himself, but his master may be outraged in his person, not however by all the acts whereby he might be outraged in the person of a child or wife, but only by atrocious assaults, clearly intended to dishonour the

fuerit, quod ap*erte* in *con*tumeliam domini fieri uidetur, ueluti si quis alienum seruum uerberauerit; et in hunc casum formula proponitur. at si quis seruo conuicium fecerit uel pugno eum percusserit, non proponit*ur* ulla formula nec temere petenti datur.

Inst. 4, 4, 3.

master, for instance, by flogging the slave; and for this affront a formula is provided in the praetor's album: but for verbal abuse of a slave, or striking him with the fist, no formula is provided, nor would an action be readily granted.

§ 223. Poena autem iniuriarum ex leg*e* XII tabula*rum* propter membrum quidem ruptum talio erat; propter os uero fractum aut conlisum trecentorum assium poena era*t*, si libero os fractum erat; at si seruo, CL; propter ceteras uero iniurias XXV assium poena er*at* constituta. et uidebantur illis temporibus in magna paupertate satis idoneae istae pecuni*ari*ae poena*e*. Inst. 4, 4, 7.

§ 223. The penalty of outrage in the Twelve Tables for a limb broken was retaliation (talio): for a bone broken or bruised three hundred asses, if the person injured was a freeman; one hundred and fifty, if he was a slave; for other injuries twenty-five asses: and in those days of excessive poverty such sums seemed an adequate reparation.

§ 224. Sed nunc alio iure utimur. p*e*rmitti*tur* enim nobis a praetore *ipsis* iniuriam aestimare, et iudex uel tanti condemnat quanti nos aestimauerimus, uel minoris, pro*ut ei* uisum fuerit. sed cum atrocem iniuriam praetor aestimare soleat, si simul constituerit, quantae pecuniae eo nomine fieri debeat uadimonium, hac ipsa quantitate taxamus formulam, et iudex qu*amuis* possit uel minoris damnare, plerumque tamen propter ipsius praetoris auctoritatem non audet minuere condemnationem.

Inst. l. c.

§ 224. The rule now in use is different: the plaintiff is permitted by the praetor to assess his own damages for the outrage, and the judex may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion. Atrocious outrage, however, is generally for the praetor to estimate; and when he has once fixed the sum in which the defendant must give security to appear at the trial, the limit is fixed at this sum in the taxatio clause of the formula; and the judex, though he has the power of condemning the plaintiff in less, generally, out of deference to the praetor, will not venture to reduce the condemnation.

§ 225. Atrox autem iniuria aestimatur uel ex facto, ueluti si quis ab aliquo uulneratus aut uerberatus fustibusue caesus fuerit; uel ex loco, ueluti si cui in theatro aut in foro iniuria facta

§ 225. Outrages are atrocious either by the act, as when a man is wounded, horse-whipped, or beaten with a stick; or from the place, as when an affront is offered in the theatre or the forum;

sit; uel ex persona, ueluti si magistratus iniuriam passus fuerit, uel senatori ab humili persona facta sit iniuria. Inst. 4, 4, 9.

or from the persons, as when a magistrate or a senator is insulted by one of inferior rank.

§ 220. Injuria in this chapter denotes not any wrongful or unlawful act, but contumelious wrong, wrong tending to degradation, a violation of the right to respect, honour, reputation; such as libel, malicious prosecution, assault and battery, and the like.

§ 221. If the husband were a filiusfamilias, the offender would be liable to a fourth action, on the part of the father of the husband. In each of these actions the damages might be different, being measured by the varying dignity of the party dishonoured by the outrage, § 225.

Outrage, like theft and robbery, and unlike damage under the lex Aquilia, requires dolus malus, or unlawful intent. In outrage, as in other delicts, the plaintiff had his option of proceeding civilly or criminally, Inst. 4, 4, 10.

Lenel, § 190, suggests the following as the formula of the actio injuriarum. Quod dolo malo Numerii Negidii Aulo Agerio pugno malo percussa est, qua de re agitur, quantam pecuniam vobis bonum aequum videbitur ob eam rem Numerium Negidium Aulo Agerio condemnari, dumtaxat HS. . . . , tantam pecuniam, si non plus quam annus est, cum de ea re experiundi potestas fuit, recuperatores, Numerium Negidium Aulo Agerio condemnato: si non paret, absolvito.

In the Roman law which was in force as the Common Law of German jurisprudence, till recently superseded by the German Civil Code, simply penal suits appear to have been obsolete, with the exception of Injuriarum (see on this subject Bürgerliches Gesetzbuch, or German Civil Code, § 823, &c.); and here the modern plaintiff has his election between pecuniary damages and an apology or revocation of the injurious utterance. An inquiry into the reason why the actio injuriarum alone has survived will illustrate the nature of simply penal suits. Their principal object, as already suggested, was to induce the aggrieved party to abstain from the remedy offered him in archaic society, self-redress or private revenge. In the case of other wrongs such inducement is no longer necessary. But in the case of Affront or Dishonour the effect of the modern code of honour has led the moderns even more than the ancients to prefer the archaic institution of Feud or private war, as embodied in the Duel, to an unromantic appeal to the public tribunals. Here, then, the inducement to abstain from self-help, which elsewhere is not needed, is still required.

Theft and Rapine are removed in the present day from the Penal

branch of the Private code to the Criminal code; that is, are not punished at the discretion of a private plaintiff, but by the action of a public prosecutor. Savigny, Law of Obligation, § 84.

Gaius seems to have been misled by a double meaning of Injuria when he connects the actio Injuriarum with the redress given by the Twelve Tables for grievous bodily harm, § 223. There seems to be no necessary connexion between bodily harm and dishonour, although both may have been denoted in Latin by the word Injuria.

In actions on Delict more especially, Real actions differing in this respect from the liability of a defendant necessarily implies that he is convicted either of Dolus or of Culpa, unlawful intention or unlawful negligence, § 211.

The opposite of Negligence is Diligence, vigilance, attention, which, like Negligence, admits of an infinite variety of gradations.

Actions under the lex Aquilia, instituted to recover for unlawful damage, are subject to this rule that, when Culpa, that is absence of ordinary care, is once established, the amount of the defendant's liability does not depend on its degree.

In actions founded on Dispositions, that is on Contract and quasi-contract, the liability of the defendant may depend on the degree of his negligence. In most relations a man is bound to make good losses occasioned by slight negligence (culpa levis in abstracto), that is, is liable for lack of ordinary care or care taken by an average paterfamilias; in others he is judged by a somewhat lower standard, being only bound to take the same care of the property of another as he is accustomed to take of his own (culpa levis in concreto): in others again he is only made answerable for the consequences of gross negligence, culpa lata.

The terms, Gross and Slight, like other quantitative terms, have no positive signification until we fix upon some unit of measurement or standard of comparison to which any given instance may be referred and by which it may be measured. Two standards are frequently employed by the Roman jurists: the vigilant care (exacta diligentia) of a good man of business (diligens paterfamilias, homo frugi) and the care which a given individual habitually bestows on his own interests (suus modus, diligentia quam suis rebus adhibere solet). Slight negligence is the absence of the diligence of the careful man of business; gross negligence falls considerably below this standard. Diligence and negligence, when referred to the standard of the careful man of business, are sometimes called abstract or absolute; when referred to the habitual conduct of the individual in the management of his own affairs, concrete or relative.

The degree of diligence required of a man in any relation and the

standard by which it is judged depends generally on the question whether he is benefited or not benefited by the relation. He who derives no benefit from it, e. g. the depositary and lender (commodator, e. g. where the borrower is thrown from a horse lent to him), is only answerable for dolus and culpa lata. On the other hand, the depositor (e. g. if the depositary is injured by an explosive deposited with him, without notice of its character) and the commodatarius are bound to show exacta diligentia. It would seem that Mandate (mandatum) forms an exception to this rule, for businesslike care (exacta diligentia) is required of the Mandatary (mandatarius), and the same rule applies to the negotiorum gestor; yet such agents, like the depositary, are strictly speaking unremunerated, though in later Roman law, as we have seen, the mandatary could often enforce payment of his honorarium by recourse to the cognitio extraordinaria of the praetor. But the real ground for imposing this liability no doubt is to be found in the confidential relation in which the mandatary stood to the mandator. Similarly, according to English law, strict diligence is required of Trustees, although they are unremunerated. The Roman Tutor and Curator, who were called on to fulfil a public function, were only bound to take the same care of their ward's property as of their own.

He then who derives advantage from a contract or disposition is required to show businesslike care, and is responsible for abstract or absolute negligence (culpa levis in abstracto); nor does it matter whether he is exclusively advantaged by the relation, like the depositor and the gratuitous borrower for use (commodatarius); or whether both parties to the disposition derive a benefit from it, e.g. venditor, emptor, locator, conductor, mortgagor, mortgagee.

Exceptions to this rule, however, are to found in the cases of the partner (socius), the tenant in common (communio), the husband in respect of dotal property, the co-heir, the co-legatee. In these relations both parties have an advantage, and yet their diligence is only estimated by the relative standard: they have to show as much care as they show in their own affairs; not more, apparently, than the tutor or curator; not the absolute care of diligens paterfamilias.

The old trichotomist division of culpa into lata, levis, and levissima, is now generally abandoned, levissima disappearing, the opposition being between culpa levis, whether in abstracto or in concreto, and gross negligence, culpa lata, which is hardly distinguishable from dolus, or intentional wrong.

Under the head of Obligatio ex delicto should be placed, according to Savigny, the doctrine of POSSESSION (Interdict-possession), or, rather, of Dispossession, with its remedies, the Interdicts Utrubi, Uti

possidetis, and Unde vi. This would agree with the Roman arrangement: at least the Roman jurists, instead of treating possession by the side of ownership, possession being the actual control of a thing as owner, while ownership is the legal right to such control, were content with regarding Dispossession as a ground of liability, imposing a secondary positive obligation on the individual dispossessor, 4 § 140, comm.

But the true place of Possession seems indicated by Vangerow, who distinguishes between the Interdicta Retinendae and Recuperandae possessionis. The Interdictum Recuperandae possessionis, i. e. Interdict Unde vi, is really based on something analogous to a delict, and might perhaps have been ascribed to delictal law: whereas Possession, as contemplated by the Interdicta Retinendae possessionis, i.e. the Interdicts Uti possidetis and Utrubi, is protected as if it were a primary right demanding universal recognition (jus in rem) that has its place in connexion with the law regulating Dominium: and the interdicts allotted for its protection, though perhaps nominally based on acts of a delictal character, are really co-ordinate not with delictal actions, but with Real actions or Vindicatio. Gaius only deals with Possession and possessory Interdicts as belonging to the code of Procedure, without indicating their position in the code of Substantive law.

ADDENDUM

FORMAL, ABSTRACT, AND SIMULATIVE DISPOSITIONS.

The following observations borrowed from Ihering are supplementary to the statements on the nature of FORMAL contracts.

The contracts which in this treatise have been designated as FORMAL are sometimes from a different point of view called ABSTRACT, and an examination of the meaning of this term may throw light on the function for which Formal contracts were invented by jurisprudence and which this term expresses. The explanation of the term turns on two conceptions: the Cause of an obligation (causa obligationis) and the Form of a Disposition: the cause alone needs elucidation.

A unilateral contract, consisting merely of a promise by one party and an acceptance by another, is the result of a decomposition of an actual transaction of commerce and life: actual transactions are always (to set aside for the present the case of Donation) bilateral. The unilateral agreement, conferring a benefit on A and imposing a burden on B, is always accompanied by another unilateral disposition burdensome to A and beneficial to B. The two unilateral dispositions are reciprocally cause and effect: when one is regarded as the causal factor, the other must be regarded (if we may coin a term) as the sequent or dependent factor of the composite or bilateral transaction.

Thus Mutuum, if we take one factor, is the promise to pay a sum *which the promisor has received from the promisee:* if we take the other factor, it is the alienation of property to a person *who promises to reconvey its equivalent to the alienor.* Depositum and Commodatum, if we take one factor, are promises to restore Detention *which has been received from the promisee:* if we take the other factor, they are a delivery by a depositor or lender of Detention *which the depositary or borrower promises to redeliver.* In Pignus there is a similar delivery and promise to redeliver Possession. Societas is a promise by a partner to contribute *towards the attainment of a common end towards which the other partner promises a like contribution.* In Mandate, there is, on the one side, a promise to perform something *at the charge and expense of a principal:* on the other, a grant of authority to deal with the property of the grantor *to a person who promises obedience to the instructions and devotion to*

the interests of his principal. Here the italicized words show the causal factors which the various unilateral dispositions require for their support: and similarly all other unilateral pacts might be shown to be dependent factors of compound bilateral transactions.

Each correlated unilateral disposition is both cause and effect. Each is a lever by which the will of one of the contractors is moved. Each is the efficient or motor cause of the other: and (as wills are only moved by motives or ends) each is the final cause of the other.

Although they are thus reciprocally dependent, yet generally in practice one habitually precedes, and thus appears to be the causal factor; while the one which habitually follows appears to be the sequent or dependent factor. This is always the case in Real and Innominate contracts, where one disposition has always passed beyond the limits of mere agreement into an alienation of property (mutuum, the innominate contracts do ut des, do ut facias): alienation of possession (pignus): alienation of detention (depositum, commodatum): or performance of service (the innominate contracts facio ut des, facio ut facias).

The Form of a disposition is what we have elsewhere called its Declaration. All dispositions have two elements or aspects, one external or corporal, the other internal or mental. Internally they are the Intention of a disposer or disposers; externally they are the expression or manifestation of this intention.

FORMAL contract separates the sequent from the causal factor of a bilateral agreement, clothes the intention in a strongly marked, sometimes strangely charactered, external expression, manifestation, or FORM, in exact conformity to the prescription of archaic law or primeval custom, and thus constitutes a unilateral contract valid by form. FORMLESS contract is bound by no requirement of Form and has no validity in isolation from its cause. FORMAL contracts from the separation or abstraction of the sequent from the causal factor, are appropriately called ABSTRACT; while for the opposite reason FORMLESS contracts may be denominated CONCRETE.

Abstract contracts sometimes contained in their formalities a shadowy recognition of their departure from the concrete realities of life—a confession of the necessity of a supporting Cause in actual commerce; but sometimes contained no such avowal. Thus Expensilatio contained the phantom of a money loan, the analogon of the 'Value received' clause in a modern bill of exchange. But this recognition was not universal; for Stipulatio, whatever may have been its original form (if derived from Stips, the word suggests prepayment by the promisee: if connected with Stipes, it merely signifies a binding formula), in the shape with which we are

acquainted, does not suggest, as a motive or cause of the advantage conferred on the promisee, any compensating burden that he has previously borne.

The function of ABSTRACT contracts, the purpose for which they were invented, is obviously the facilitation of the Proof of rights and duties by means of the simplification of their Title. The more comprehensive the conditions of the Title to which a right is annexed, the more complicated and troublesome will be its Proof. The causal factor of Formless contracts yields to a fraudulent debtor at least as many positions where he can intrench himself as the sequent factor. The necessity imposed on the plaintiff in an action on a Formless contract of proving the existence of an adequate cause doubles his burden of proof: Abstract contracts reduce this burden to a fraction.

From the statement, 3 § 92, comm., that a certain evidence of the contract is an integral part of Formal but not of Formless contracts, that Formal contracts, in other words, take up into their essence a certain preappointed evidence, while Formless contracts are complete independently of this, it might be inferred that the elements of the Formal contracts were more complex than those of the Formless: but this would be an erroneous conclusion. The admission of evidentiary matter into the essence of the Formal or Abstract contract is more than counterbalanced by the exclusion of the causal factor. The evidentiary matter is something visible and audible and easy of proof and adjudication; prescribed, indeed, for the very reason that it is so easy of proof and adjudication: whereas the causal factor, involving a question of ulterior as well as of immediate intention, may furnish scope for endless subterfuge and controversy.

The validity of Formal contracts irrespective of the causal factor was to a certain extent infringed in later jurisprudence by the admission of the Exceptio doli, more particularly in its form of Exceptio non numeratae pecuniae. Thus for the space of two years after a cautio for a loan by stipulation or otherwise had been given, the creditor who sought to enforce the contract was under the necessity of proving the existence of the causa (numeratio pecuniae): to this extent, then, Stipulatio was reduced to the disadvantageous position of a Formless contract, 3 §§ 97–109, comm.

FORMAL dispositions were not confined to the sphere of contract: in the sphere of alienations Traditio is Formless, while Mancipatio and In jure cessio are Formal. Formal alienations present the same contrast that we noticed between Formal contracts. Mancipatio by its simulation of a purchase and the payment of purchase money makes the same recognition of a causal factor that Nexum and Expensilatio made by the payment, or fiction of payment of, a loan; while in Jure cessio (if we can speak with confidence of a process

about which we know so little) resembled Stipulatio in containing no such recognition.

Ihering, who has handled this topic, § 55, applies the term ABSTRACT to Formal alienations. When, however, we compare Formal and Formless alienations we find the terms Abstract and Concrete not so applicable to alienations as they were to contracts, and for this reason: in Formless alienation there is as complete an ABSTRACTION or severance of the sequent from the causal factor as there is in Formal; and Tradition is as unilateral a transaction as Mancipation or Surrender before a magistrate.

This assertion may seem inconsistent with the doctrine (2 § 65, comm.) that, to constitute a valid alienation, Tradition must be preceded by some justa causa, Donatio, Contractus, or Solutio. The preceding disposition, however, is not required in order to form the causal factor of a bilateral disposition, but in order to furnish evidence of the Intention required for a unilateral disposition: to prove the existence of animus transferendi dominii, without which Tradition would be a Form without a substance, would want the internal element it requires in order to amount to a Disposition. Once let the sequent factor, the intention requisite for a unilateral disposition, be proved, and the justa causa, the donandi, credendi, solvendi animus is immaterial. Thus a misunderstanding between alienor and alienee respecting the nature of the transaction, the one intending a loan the other a donation, or the one intending the discharge of a debt imposed by testament the other the discharge of a debt imposed by stipulation, is immaterial: because the intention of donation and of loan, of paying a legacy and of paying a stipulated debt, alike involve the animus transferendi dominii. Cum in corpus quidem quod traditur consentiamus in causis vero dissentiamus, non animadverto cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus, Julian, Dig. 41, 1, 36. An error in respect of the causa may be sufficient to entitle an alienor to condictio indebiti or condictio sine causa; i. e. to a suit for restitution for want of consideration: but it does not prevent the transfer of ownership in the first instance: and if the property passes onward to a third person the alienor cannot reach it in his hands, but has only a personal action against the original alienee.

In one particular instance, by special statutory enactment, the causa traditionis is material to the efficacy of Tradition. Tradition solvendi animo, when the solutio intended is the performance of

a contract of sale, operates no transfer of ownership except in sales expressly on credit until the purchase money is paid or security is given for its payment. This, as we have seen, 2 § 65, comm., was a provision of the Twelve Tables in respect of Mancipation, and in later times extended to Tradition. Surrender before the magistrate was not thus restricted in its operation, but transferred ownership irrespectively of the payment of purchase money. Ihering also holds that in Mancipation the requirement of the Twelve Tables was deemed to be satisfied by the simulation of payment (isque mihi emptus est hoc aere aeneaque libra); and he suggests that the existence of the requirement was the very reason why the simulation of payment was introduced into this solemnity.

In this single point, then, Mancipation (if Ihering's view on the subject is accepted) and Surrender before the magistrate were more completely isolated from their causa than Tradition: but with this exception, Formal and Formless alienations were equally ABSTRACT. Both operated a transfer of ownership in spite of any flaw in the causa. If such a flaw existed in either a Formal or a Formless alienation, it only gave the alienor a personal action (condictio) against the alienee for restitution. He could not recover the property if it had passed out of the hands of the first alienee into those of a second.

If we inquire why Formless alienation was allowed to have validity irrespectively of the causal factor, we shall find the reason to be, that Tradition or parting with possession, though a Formless proceeding, is an act of so serious a character as effectually to preclude all idea of indecision—to prove that the parties had reached the stage of definitive resolution. Accordingly the intention of transferring ownership when manifested by Tradition seems to deserve all the efficacy that could be imparted by the observance of the most solemn Forms.

As in the later jurisprudence Stipulatio was robbed of part of its efficacy by the Exceptio pecuniae non numeratae, so, though at an earlier period, and in a different way, Alienations and other transactions, whether Formal or Formless, could be prevented from operating by the in integrum Restitutio, and by the actio quod metus causa, impersonal remedies (in rem) which reached the person benefited by property to whatever hands it might have arrived by the effect of subsequent alienations.

If, then, Formal alienations were not simplifications of title in virtue of any greater ABSTRACTNESS than was possessed by Formless alienation, for what other advantage were they introduced into commerce? by what other attribute were they a facilitation of Proof? They facilitated proof (1) of the specific intention of a disposer against an allegation of a different intention, and (2) of the existence of intention against the denial of all intention.

(1) Delivery of a thing might be made with the design of merely transferring Detention. Such was its effect in Depositum, Commodatum, Mandatum, Locatio. Or, secondly, it might be made with the purpose of transferring something more than Detention, namely Possession. Such was its effect in Pignus and Precarium. Or, thirdly, it might be made with the intent of transferring Ownership, as in Donatio, Mutuum, Solutio. Which of these intentions prompted a given Delivery might be extremely difficult to prove. The difficulty vanishes in Mancipation and Surrender before a Magistrate. Their forms comprehend a most emphatic and trenchant expression of intention. 'I assert that this slave is my own' (hunc ego hominem meum esse aio) is the exclamation of the alienee, confirmed by the assent of the alienor, in both modes of Formal alienation.

(2) Formless dispositions, whether alienations or contracts, may leave a doubt not only which of several intentions governed a procedure, but whether any intention at all had been matured in the minds of the negotiators. Had the parties passed the stage of mere contemplation, inclination, preliminary discussion, were they still vacillating, now yielding to an attractive prospect, now receding from half-made concessions? Or had cupidity and timidity, desire and hesitation, given place to final decision and deliberate resolve? It is obvious that the formalities of the solemn modes of contract were invented for the purpose of excluding all doubt from the answers to these questions.

Beginning these remarks we adjourned the consideration of Donation, which may now be noticed. Unilateral dispositions, we have seen, do not exist in the actual world unaccompanied. Each implies another on which it leans. Intention to incur a loss has its final and efficient cause in intention to procure a gain. If this was universally true we might say that all dispositions were in respect of motive bilateral: i. e. that in all a pecuniary loss incurred at one stage of the transaction is balanced by a pecuniary gain accomplished at another. This holds of all mercantile transactions which are the bulk of those that occupy the attention of jurisprudence. The market, however, is not the whole of the world, nor are mercenary acts the whole of life; and there is such a thing as a disinterested disposition, a disposition wherein a man incurs a loss to which the causa or motor factor is the intention not of counterbalancing gain in another part of the transaction, but of pure and simple and unrequited liberality.

Donation may be found in the sphere either of Ownership or of Obligation; it may be accomplished either by alienation or by promise: the intention of liberality may be consummated either by Tradition or by Stipulation. Donation, that is to say, is one of the causae obligationis as well as a justa causa traditionis: and it was in

contemplation of a contract animated by such a cause that we abstained, when beginning this note, from saying unreservedly that all actual agreements were in respect of the motives giving rise to them bilateral.

I will seize the present opportunity of supplying an omission in the commentary and noticing another feature common to many Formal dispositions.

The FORMAL dispositions of Roman jurisprudence were frequently SIMULATIVE. When a new juristic purpose was to be accomplished, the method of jurisprudence was, instead of creating for it by an effort of imagination a new corporeal form, to lay hold of some existing disposition, and wrenching it more or less completely from its original basis and original uses, to employ its more or less twisted and distorted form as a vehicle or incorporation of the new intention. The new intention is the reality: the original intention is divorced from the form once its own, and now is merely SIMULATED. Thus the festuca wielded in Sacramentum perhaps represents the weapon intended to be used in a duel, the older mode of ascertaining rights. Surrender before the magistrate (in jure cessio) is intended to effect a transfer of ownership from person to person: in form it is a judgment respecting an already existing ownership. Transcripticia nomina were intended to operate novations, to transform equitable into legal obligation: in form they were loans of money. Mancipation, a solemn form of conveying dominion, simulated a sale and the accompaniment of primeval sales, the weighing of the uncoined masses of bronze that served as purchase money. The form then, instead of being the natural execution and expression of an intention, has but a remote correspondence to the end which it embodies, and sometimes may be called SYMBOLIC: e. g. the production of the scales and bars of bronze and pantomime of weighing in Mancipation was the natural mode of executing an archaic sale, but is merely a SYMBOLIC or hieroglyphic expression of the transfer of ownership. Sometimes a mimetic disposition became itself the object of subsequent mimicry, as is seen in the mode of discharging obligations, called acceptilatio Aquiliana.

The Simulative character was not a universal feature even of the older Formal dispositions: for instance, Stipulation seems to have had nothing mimetic in its form: while later jurisprudence, when it had to invent a form, never adopted the symbolic style. Rigorous forms were prescribed as a condition of the validity of various dispositions: e. g. the presence of a certain number of witnesses for the execution of a Will: memorandum in the judicial records (actis, gestis insinuare) for donations of more than 500 solidi or for effecting emancipation by entry in such records (emancipatio Justinianea): none of which were simulations of any more primitive procedure.

The degree of integrity or mutilation in which the primeval disposition persisted in the modern institution varied in different instances. Sometimes the old proceeding imposed all its rules on the new institution: more commonly many of its aspects were effaced and only isolated incidents continued in force. The procedure which involved Coemptio, 1 § 113, was applied by the ingenuity of later jurists to accomplish three purposes never dreamed of by those who presided over its introduction: the extinction of the sacred rites by which the estate of an heiress was burdened; the change of guardian by a woman at the period when all women were under wardship; and the acquisition of testamentary capacity by a woman at a time when widowhood was the only title by which it could be acquired. It was a complicated process and consisted of three factors, each of which was an archaic institution: (1) a Hand-marriage (in manum conventio) accompanied with a fiducia for remancipation; (2) a remancipation accompanied with a fiducia for manumission; (3) a manumission and consequent wardship. Of these factors the Hand-marriage was a pure unreality: it was divested of reality by the accompanying fiducia; yet one of its incidents continued in force, the transfer of the obligation to the sacred rites from the heiress to the coemptionator. The second act was so far an unreality that it was no longer the sale of a wife by her savage lord in exchange for some more coveted commodity: but it was real so far as it subjected the remancipated woman to capitis minutio. The manumission was unreal so far as it implied a vindication into freedom or a liberalis causa and an escape from the hardships of bondage: but it was real so far as it had the effect of making the manumitted ex-bondwoman the ward of her manumitter.

Emancipation, 1 § 132, was a process which usually consisted of four mancipations and three manumissions. The first three mancipations were each accompanied by a fiducia of the alienee: the first two by a fiducia binding the alienee to manumit the son, the third by a fiducia binding the alienee to remancipate the son to the father. By the final manumission the parens manumissor became the patron of his son. Here we have another ceremony which employed a primitive disposition divested of its natural motive. The independence of the son whose father had three times sold or leased his patria potestas over him to a stranger was originally enacted by the Twelve Tables as a punishment for an odious and unnatural exercise of parental rights. In later times the mancipation of the son for the sake of its legal consequences was an act of self-abnegation on the part of the father; a means of promoting the son to an independent position, the status of head of a household.

The positive and arbitrary character of SIMULATIVE dispositions

displays itself in the fact that the laws of the original dispositions which they welded into their substance were neither consistently regarded nor consistently disregarded. (A) Sometimes they were regarded in spite of the inconvenience they occasioned: (B) sometimes convenience prevailed: the new institute acquired an independent position; and logic and archaeology were set at defiance.

(A) The form of surrender before the magistrate could not be employed for the acquisition of property by the agency of an inferior (son or slave), because such a person could not be a plaintiff in a genuine vindicatio. Hence the inferior could be an instrument for acquiring a rustic servitude, because he could be a party to a mancipation, but not for acquiring an urban servitude, because this could only be conveyed by surrender before the magistrate, 2 § 29.

In Mancipatio the payment by bars of bronze became as fictitious as the adprehensio or taking possession; and yet, according to Ihering, it sufficed to satisfy the requirement of the Twelve Tables whereby in Sale and delivery the passing of property was suspended until payment of the purchase money. (See 2 §§ 15–27, comm., and cf. Sohm, p. 60, &c., Muirhead, p. 134, &c.)

Manumission of the son by the emancipating father from the shadowy state of mancipium invested the latter, if he survived his son, with the serious pecuniary rights of patronus against his testate or intestate succession.

Women were incapable of Adrogation, because this solemnity involved a formal assembly of the Comitia Curiata; and in such an assembly women were not allowed to be present.

In the mancipatory will the Familiae emptor was originally in the place of the heir; and therefore, to exclude partial testimony (domesticum testimonium), persons united to Familiae emptor by the bond of patria potestas were disqualified for the rôle of witness. The disqualification was continued, in spite of the inconvenience it would occasion, when the familiae emptor was a mere form; and, what is more extraordinary, legatees and persons united to the real heir were admissible as witnesses, although the policy of the law was thereby entirely put into confusion (totum jus tale conturbatum fuerat, Inst. 2, 10, 10). The requirement of testamenti factio passiva at the time of the making of a will, as well as at the time of the testator's death and the time of acquisition by the heir, was, according to Savigny, § 393, only an irrational consequence of the simulation of Mancipium in a will.

(B) In the following instances, on the contrary, the laws of the simulated institution were disregarded or transformed. Hereditatis petitio being a form of Vindicatio we might have expected that any kind of inheritance when once vested would be transferable by

surrender before the magistrate or fictitious vindication, just as any inheritance could be claimed by genuine hereditatis petitio. But we find that only the intestate succession of a collateral (legitima hereditas) could be thus conveyed, if, made after aditio, it transferred only the corporeal property of the inheritance, not the inheritance itself, 2 § 35. Cf. Sohm, p. 533, n. 3.

In Mancipatio, although the fictitious payment sufficed for the transfer of dominion, yet actual payment or credit was required for the purpose of making the alienor subject to auctoritas, that is, to liability to repay twice the purchase money in the event of eviction, Paulus, 2, 17, 13. Cf. Muirhead, Roman Law, § 30.

Again, the Census, like a year of jubilee, appears to have liberated from genuine bondage; but not to have broken the fictitious bondage of a son who was in the course of emancipation, 1 § 140.

Coemption, we are told, transferred to the husband the universal estate of the wife, 2 § 98. We may suppose that it had not a similar effect on the property of a woman who merely made a coemption for the purpose of changing her guardian or acquiring testamentary capacity, though it may perhaps have been that the transfer took place but that the coemptionator was under a fiducia to retransfer it.

The genuine sale of a wife was probably forbidden at an early period under the severest religious sanctions: this did not prevent the simulated sale (remancipatio) of a woman by her coemptionator, i. e. the simulating disposition when once established was free from the supervening rules of the simulated disposition.

A Testament was originally a Mancipation; but the familia or juris universitas, the object of testament, is not found in the catalogue of mancipable things (res mancipi): a testament was revocable, a mancipation irrevocable: the mancipation itself could not have its operation suspended or made contingent on a condition, though it could be made subject to nuncupatory and fiduciary claims; a testament became by means of the nuncupatory part of the mancipation a disposition de futuro and might be conditional: a mancipation only conveyed real rights; nexum, which imposed obligation, though cognate, was a distinct institution: testament invested the heir with the entire property of the deceased, including his obligations: mancipation only affected the alienor and alienee; testament conferred rights on heirs and legatees, i. e. strangers who had in no way cooperated in the execution of the testament. The sacrifice of reality to fiction by the slavish adherence to the rules of domesticum testimonium makes it the more remarkable that the testament should have burst asunder so many other restrictions of mancipation. Ihering, Geist des Roemischen Rechts, § 58.

COMMENTARIVS QVARTVS

§ 1. ————|— quot genera actionum sint, uerius uidetur duo esse, in rem et in personam; nam qui IIII esse dixer*u*nt ex sponsion*um* generibus, non animaduerterunt quasdam species actionum inter genera se rettulisse. Inst. 4, 6, 1.

§ 1. We have now to treat of Actions, which according to the better view fall into two classes, being either Real or Personal: for those who count four classes, including the forms of sponsio, commit the error of co-ordinating sub-classes with classes.

§ 2. In personam actio est, qua agimus cum aliquo, qui nobis uel ex contractu uel ex delict*o* obligatus est, id est cum intendimus DARE FACERE PRAESTAR*E* OPORTE*R*E. Inst. l. c.

§ 2. A Personal action is an action which seeks to enforce an obligation imposed on the defendant by his contract or delict, that is to say, is an action by which one claims in the intentio of the formula that he is bound to convey some property to one, or to perform for one some service, or to make some other kind of performance.

§ 3. In r*em* actio est, cum aut corporalem rem intendimus nostram esse, *aut i*us aliquod nobis conpetere, ueluti utend*i* aut utendi fruend*i*, *e*undi agendi aquamue ducendi uel altius tollendi *pr*ospiciendiue; ⟨*aut cum*⟩ actio ex diuerso aduersario est negatiua. Inst. l. c.

§ 3. A Real action is an action by which one claims as one's own in the intentio some corporeal thing or some particular right in the thing, as a right of use or usufruct of a thing belonging to a neighbour, or a right of horseway or carriage-way through his land, or of fetching water from a source in his land, or of raising one's house above a certain height, or of having the prospect from one's windows unobstructed; or when the opposite party (that is the owner) brings the negative action asserting that there is no such right in the thing.

§ 4. Sic itaque discretis actionibus certum est non posse nos rem nostram ab alio ita petere SI PARET EVM DARE OPORTERE. nec enim quod nostrum est nobis dari potest, cum scilicet id dari nobis intelle-

§ 4. Real and Personal actions being thus distinguished, it is clear that I cannot demand my own property from another in the following form: 'If it be proved that the defendant is bound to convey such property to me.' For

gatur, quod ⟨*ita datur, ut*⟩ nostrum fiat; nec res quae ⟨*nostra iam est*⟩ nostra ampl*ius* fieri potest. plane odio furum, quo magis pluribus actionibus tenean*tur*, receptum est, ut extra poenam dupli aut quadrupli rei recipiendae nomine fures *etiam* hac action*e* teneantur SI PARET EOS DARE OPORTERE, quamuis sit etiam aduersus eos haec actio, qua rem nostram esse petimus. Inst. 4, 6, 14.

what is already my own cannot be conveyed to me, since conveyance to me makes a thing mine, and what is already mine cannot be made more mine than it is. Yet, to show the law's detestation of thieves, in order to make them liable to a greater number of actions, it is received doctrine that besides the penalty of twice the value of the thing stolen awarded against the thief not caught in the act, and the penalty of four times the value against the thief caught in the act, damages for the thing itself may be recovered by a personal action in which the contention is thus worded: 'If it be proved that the defendant ought to convey the thing in question,' although they are also liable to be sued by an action with the intentio thus formulated: 'If it be proved that the plaintiff is owner of the thing in question.'

§ 5. Appellantur autem in rem quidem actiones uindicationes, in personam uero actiones, quibus DAR*I* FIERIVE OPORTERE intendimus, condictiones. Inst. 4, 6, 15.

§ 5. A Real action is called vindicatio; a Personal action, whereby we contend that some property should be conveyed to us or some service performed for us, is called condictio.

§ 6. Agimus autem interdum, ut rem tantum consequamur, interdum ut poenam ta*n*tum, alias ut rem et poena*m*. Inst. 4, 6, 16.

§ 6. We sue sometimes only to obtain property, sometimes only for a penalty, sometimes both for property and for a penalty.

§ 7. Rem ta*n*tum persequimur uelut actionibus, ⟨*quibus*⟩ ex contractu agimus. Inst. 4, 6, 17.

§ 7. We sue, for instance, only for property in actions founded on contract.

§ 8. Poenam tantum *per*sequimur uelut actione furti et iniuriarum et secundum quorundam opinionem actione ui bonorum raptorum; nam ipsius rei et uindicatio et condictio nobis conpetit. Inst. 4, 6, 18.

§ 8. We sue, for instance, only for a penalty in the action of Theft and of Outrage, and, according to some, of Rapine; for we may obtain restitution on account of the thing itself either by vindicatio or condictio.

§ 9. Rem uero et poenam per-

§ 9. We sue, for instance, both

sequimur uelut ex his causis, ex quibus aduersus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni in*iuria*e *legis* Aqu*iliae*, a*ut* legatorum nomine quae per damnationem cert*a* relict*a* sunt. Inst. 4, 6, 19.

for property and for a penalty in those actions where the defendant who denies his liability is condemned to pay double, as in the actions to recover a judgment debt, to recover money paid by a sponsor for his principal, to recover damages for injury to property under the lex Aquilia, and to recover legacies of a definite amount bequeathed in the form of legacy per damnationem.

§ 1. From Substantive law Gaius now passes to the law of Procedure, confining himself partly with its Material as opposed to its Formal aspect: dealing with actions, that is to say, not so far as they are merely the method of realizing rights, but also as being the rights themselves which entitle a person who is wronged to obtain redress by legal process. Dig. 44, 7, 51, actio est jus, quod sibi debeatur, judicio persequendi.

If we inquire which code is the earlier in its development, the Substantive code or the code of Procedure, the answer is that they are essentially contemporaneous: a Substantive code can have no actual existence unless there is some method of giving it force; and again, a code of procedure can have no meaning unless there is a substantive law to be administered. But after recognizing that the two codes are correlative and necessarily coexistent, we find that historically the code of Procedure is prior in the chronological order: it attains to a high grade of development, while the Substantive code, which started into birth at the same time, remains in a rudimentary, undeveloped condition. Courts of law once established soon evolve strict rules to govern their proceedings, while society is in too rudimentary a condition to enable it to define the substantive law brought into existence by the legal remedies which are provided.

The following contrast of ancient and modern jurisprudence here deserves a notice. No primary rights can be conceived without sanctioning rights, or rights which arise when the primary rights are violated: and again, no sanctioning rights can be conceived without Actions or modes of evoking the interposition of the sovereign power. And, as Rights imply Actions, so reciprocally Actions imply Rights. But though, as corresponding or correlated terms, Right and Action have a necessary connexion, and the existence of one may be inferred from the existence of the other; systems of jurisprudence may differ in different stages of development as to which of these terms, the Right or the Action, they deem the more evident; which they regard as the datum and which

the matter to be proved; which the logical premiss and which the conclusion.

In primitive jurisprudence, when there is little direct intervention on the part of the state with private law, the Remedy is regarded as the certainty; the Right, primary or sanctioning, as the matter of deduction. The forms of Action, emphatically so in Statute-process (legis actio) and to a great extent even in the Formulary system as crystallized by statute or laid down in the edict, were capable of enumeration and incapable or difficult of multiplication; and from the application by the courts of these forms the citizen might deduce the list of his legal rights and duties. The logic of ancient law may be expressed in the maxim: Where there is a Remedy there is a Right: There is no Right unless there is a Remedy.

The modern jurist assumes the other, the more ideal of the two correlated terms, to be the more evident, and acts upon the converse maxim: Where there is a Right there is a Remedy; or, Given the Right, the Remedy follows. The action now is the dependent term: its forms are unimportant and indefinitely variable; they are no longer crystallizations. If a Right is established and no appropriate form of action seems to exist, a new one is forthwith invented, and its fitness to enforce the established right is sufficient to procure its recognition by the judicature. Such at least, if not opposite goals at which ancient and modern jurisprudence have arrived, appear to be opposite directions in which they diverge.

Sponsio or wager between the parties to a litigation was an indirect mode of submitting questions to judicial decision, which seems to have been in use before the introduction of the formulary system. We are left to conjecture how its classification enabled any jurist to count four classes of action. Its principal division seems to be into the sponsio where the pecuniary risk was serious and the penal sum important (sponsio poenalis), and the sponsio used for the purpose of framing an issue to be tried where the penal sum was nominal and not actually exacted (sponsio praejudicialis). This division of actions into four instead of two classes may possibly have arisen from the difficulty of finding a place in the twofold division for interdicta and praejudicia. The four classes of actions which Gaius refers to would accordingly be, actio in rem, actio in personam, actio per sponsionem praejudicialem, actio per sponsionem poenalem; but as the last form of action is regarded as being in personam, and the actio per sponsionem praejudicialem as in rem, Gaius prefers the twofold division. (Cf. Keller, Civil Process, § 87, n. 82.) According to Huschke the four classes intended are (1) personalis actio, (2) petitoria formula, (3) in rem actio, per sponsionem cujus summa per formulam petitur, (4) per sponsionem cujus summa

sacramenti actione petitur. (See Muirhead's Gaius, h. l.) In either case the classification would involve a co-ordination of sub-genera and genera, or subdivisions and divisions.

A Real action, § 3, is one which asserts a jus in rem, a Personal action, § 2, one which asserts a jus in personam. A jus in rem, we may remember, is a right to certain forbearances, or freedom from molestation, corresponding to a duty imposed on all the world: a jus in personam is a right to certain performances or forbearances corresponding to a duty imposed on a determinate person. Jura in rem, which are rights of property, are Ownership, and jura in re aliena, such as Servitude, that is, some fraction of ownership, Emphyteusis, and Pignus. Jura in personam are Obligations founded on either contract or delict, or some quasi-contract or quasi-delict.

A Real action, accordingly, asserts either the ownership (hunc hominem meum esse aio) of the plaintiff or one of the jura in re aliena above mentioned; a Personal action asserts an obligation of the defendant towards the plaintiff.

In Roman law, it should be remembered, a claim of property in a movable is a Real action just as much as a claim of property in an immovable. Thus the distinction between Real and Personal actions which we meet with in the history of English law diverged widely from its Roman prototype.

A Real action or actio in rem when carried on in the form of legis actio sacramento, § 16, contained an assertion by each party of his claim to the thing not as against the other party to the suit, but absolutely.—Hunc ego fundum ex jure Quiritium meum esse aio, &c., and similarly in the formulary procedure a real action names no party but the Plaintiff in the intentio, the principal part of the formula or written instructions of the praetor to the judex, in which the plaintiff's claim is specified; e.g. Si paret hominem quo de agitur ex jure Quiritium Auli Agerii esse; whereas a Personal action names the defendant as well as the plaintiff in the intentio, e. g. Si paret Numerium Negidium Aulo Agerio H. S. decem milia dare oportere.

A vindicatio originally in the form of legis actio sacramento in rem, in which the striking the slave with the vindicta or wand was retained, survived in the in jure cessio used for the purpose of manumission (vindicatio in libertatem), and also in the form of adoption, cf. 1 § 134—is qui adoptat vindicat apud praetorem filium suum esse, et illo contra non vindicante a praetore vindicanti filius addicitur. Trials concerning status were, we know, carried on in the decemviral court by process of legis actio till the time of Augustus. We know that in a question of libertas (liberalis causa), until the time of Justinian, the person whose freedom was in dispute could not be either plaintiff or defendant, his rights were

advocated by an Adsertor, Cod. 7, 17, De adsertione tollenda. Under the formulary system questions of status might be tried by a praejudicium, § 44, which was regarded as a kind of actio in rem. We have no record of the precise form of the intentio in this case.

A vindicatio asserting ownership in land contained an intentio in these words: Si paret illum fundum ex jure Quiritium Auli Agerii (Plaintiff) esse. A vindicatio claiming not absolute property, but some fraction of ownership (jus in re aliena), for instance, a rural servitude, contained an intentio to this effect: Si paret Aulo Agerio jus esse per fundum illum ire agere, quanti ea res erit, &c., or, Si paret Aulo Agerio jus esse aedes suas altius tollere invito Numerio Negidio, quanti, &c., § 3. Cf. §§ 92, 93.

A Personal action, as we have seen, named in the intentio the defendant, who was alleged to be under an obligation to the plaintiff. E. g. if the plaintiff alleged that the defendant lay under an obligation to restore to him the thing he had lent him, the action was in this form: Si paret Aulum Agerium Numerio Negidio rem de qua agitur commodasse eamque Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam condemna, si non paret, absolve.

The word Dare is used in the Intentio of a Condictio Certi, i. e. an action wherein the plaintiff asserts that the defendant is under an obligation to convey quiritary property in a determinate thing, whether a sum of money or any other object of property, a certain slave, certain corn, certain land. E. g. Si paret Numerium Negidium Aulo Agerio sestertium decem milia—tritici Africi optimi centum modios—dare oportere.

The word Facere never appears to stand alone in an intentio, but in its stead we have Dare facere in the Intentio of actio ex stipulatu, that is, of an action on a stipulation to enforce a claim of an uncertain amount, a claim of any service but the transfer of quiritary property in a certain thing, that is, to enforce any obligation not included under Dare as above defined. E.g. Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere, § 5, comm.

Praestare is a term of wider meaning than the two preceding, and appears specifically to denote reparation for any harm, compensation for any loss, damages for breach of any obligation other than liability —*dare*—or dare facere. But some writers have tried to attach a more definite meaning to the term. (Cf. Muirhead's Gaius, 4 § 2.) We find it is used in connexion with some arbitria and actions ex fide bona, where the defendant's liability was to be determined at the discretion of the arbiter or judex. In all civil actions founded on Delict the intentio frequently contains the terms: damnum decidere oportere, § 37, for which some writers think praestare to have been an equivalent.

§ 3. Negativa. An action respecting a servitude was either Confessoria or Negativa. If the plaintiff claimed a servitude over the land or house of the defendant, his action was called Confessoria; if he denied that his own land or house was subject to a servitude, his action was called Negativa (or Negatoria) in rem actio. In Confessoria the intentio was of the form, si paret Aulo Agerio jus esse eo fundo quo de agitur uti frui: in Negatoria of the form, si paret Numerio Negidio jus non esse eo fundo de quo agitur uti frui invito Aulo Agerio. In this action the plaintiff, probably, was not bound to prove a negative, but only the existence of his own ownership; it would then be incumbent on the defendant to prove affirmatively a limitation of this ownership. The actio negatoria is, it must be remembered, maintainable by the owner of property, not only when some one claims a servitude over it, but also in the case of any other interference with his rights, short of actually depriving him of possession. It is, like vindicatio, an actio in rem based on title of ownership, so that in bringing it, it is incumbent on the plaintiff to prove his ownership, which is a proverbially difficult subject of proof.

The coexistence of actio confessoria and actio negatoria with the antithesis of Positive and Negative servitudes is at first sight embarrassing: for we might suppose that an actio Confessoria of a jus altius tollendi was equivalent to an actio Negatoria of a jus altius Non tollendi; and that an actio Confessoria of a jus altius Non tollendi was equivalent to an actio Negatoria of a jus altius tollendi: so that the law would be encumbered by a redundancy of forms.

The following appears to be the explanation and to reconcile statements in our authorities which at first sight are inconsistent. The nature of the Servitude, Positive or Negative, alleged by the plaintiff and, consequentially, the character of the action, Confessoria or Negatoria, which he instituted, depended on the nature of the facts on which he relied as his title and on the nature of the allegations by which the defendant opposed his claim.

The plaintiff asserted a right of raising the height of his house by an actio Confessoria of a jus altius tollendi, consistently with the statement in § 3, if he alleged the Extinction of a former jus altius Non tollendi, i. e. the recovery of his original freedom; for we have mentioned, 2 § 31, comm., that the extinction of an Urban servitude could only be accomplished by the erection of a contrary or antagonistic servitude: whereas he asserted it by an actio Negatoria of a jus Non altius tollendi, consistently with Dig. 8, 5, 4, 7 (competit autem de servitute actio domino aedificii neganti servitutem se vicino debere), if he denied that such a jus Non altius tollendi had ever existed.

Similarly a right of prohibiting a neighbour from raising the height of his house would probably be asserted by actio Confessoria of jus Non altius tollendi if the defendant denied that such a right had ever existed: by actio Negatoria of jus altius tollendi, consistently with Inst. 4, 6, 2 (contra quoque de usufructu et de servitutibus praediorum rusticorum, item praediorum urbanorum invicem quoque proditae sunt actiones, ut quis intendat jus non esse adversario . . . altius tollendi . . . ; istae quoque actiones in rem sunt, sed Negativae. Quod genus actionis in controversiis rerum corporalium proditum non est; nam in his is agit qui non possidet: ei vero qui possidet non est actio prodita, per quam neget rem actoris esse), if the defendant contended that, though it once existed, it had been extinguished by usucapio libertatis.

Whether an action was Confessoria or Negatoria might possibly depend on the form in which the owner asserted the freedom of his property from any claim on the part of another to interfere with it. For instance, in Dig. 8, 5, 4, 7, where Ulpian is apparently speaking of actio Negativa of jus Non altius tollendi, he presently adds: hoc igitur intendo, habere me jus altius tollendi invito eo cum quo ago: terms which seem more appropriate for expressing an actio Confessoria of a jus altius tollendi; and which probably would express such an action, if the plaintiff intended to aver a reacquisition of his original freedom.

In both Confessoria and Negatoria the first proof was, according to the ordinary rule, incumbent on the plaintiff. The plaintiff Negator of jus Non altius tollendi or Assertor of jus altius tollendi had first to adduce proof in support of his contention—which in the former case would be simply to prove the fact of his ownership—before the defendant was called upon to prove his opposite contention: and the plaintiff, as asserting a right of servitude, must begin with adducing proof of its existence before the defendant is called upon to disprove its existence or to prove its extinction. Cf. § 88, comm.

The abolition in England of real actions has destroyed most of the likeness that once existed in the remedies provided by English law for the protection or impeachment of Profits and Easements (more or less identical with the rights which the Romans called Servitudes) and the remedies by which at Roman law Servitudes were protected or impeached. Before the abolition of Real actions each incorporeal hereditament was asserted or contested by some Real action corresponding either to actio Confessoria or to actio Negatoria. After their abolition the only remedy is Trespass or Trespass on the case (or their modern equivalents), personal actions which procure not restitution of a real right, but satisfaction in damages for injury sustained by its contravention, and which will lie

as often as the wrong is repeated: or the Chancery or other Division of the High Court will stay the continuance or progress of a wrong by the issue of an Injunction.

As the perfect right of Ownership is supplemented by a less perfect right, the right of Possession, protected to some extent by possessory interdicts instead of by vindicatio, the remedy of Ownership; so the fraction of Ownership or perfect right which forms a Servitude is supplemented by an imperfect right, a right of Quasi-possession, also protected by Interdicts, some identical in character with those which protect Possession, some varying with the nature of the Servitude, § 139.

§ 4. Gaius points out that the Roman law of his day was illogical in allowing condictio on account of stolen property, cf. Inst. 4, 6, 14, no transfer of ownership being operated by theft. Roman law contained no disposition similar to that of English law, that property in stolen goods passes by sale in market overt. Even in the hands of a third person, an innocent purchaser, the thing remained the property of the original owner, exempt from the potent chemistry of usucapion. It follows that the action for obtaining restitution logically competent to the owner who still remained owner was vindicatio, and not an action based on an obligation to convey ownership to the plaintiff.

In the condictio ex causa furtiva, instead of the intentio, Si paret dare oportere, § 4, which implies that the plaintiff is not owner, we might have expected him to sue with the intentio, quidquid paret Dare facere oportere, which might be merely a form of claiming damages for the injury, and accordingly would be consistent with his ownership. The explanation why the other formula was allowed seems to be that at the time when this remedy on account of furtum was established condictio could only be brought on account of certa pecunia or certa res. The form of condictio was perhaps adopted in this case, though at the cost of an anomaly, in order to make the action transmissible against the heirs of the delinquent, a delictal action being intransmissible.

§ 5. Condictio is an actio stricti juris, see §§ 18–20, comm. (For the distinction which is sometimes drawn between condictio and other kinds of actiones stricti juris see Sohm, § 80, n. 6.) It therefore excludes, besides all actions in rem, actions bonae fidei (which had an intentio Quidquid dari fieri oportet ex fide bona, § 47), and praetorian actions in personam; moreover actions ex delicto with the exception of condictio furtiva, which, as we have seen, is anomalous, § 4, belong to a different category. In its original and strict form it was always Condictio certi, with an intentio, Si paret dare oportere. It is either brought to recover a certain sum of money, Condictio certae

pecuniae, or is brought to recover corn (hence its name), land or a slave or any other certain thing, and then is called Condictio triticaria, e. g. si paret Numerium Negidium Aulo Agerio tritici Africani optimi modios tot dare oportere, quanti ea res est, &c., Lenel, p. 190. Condictio then, strictly speaking, denotes the certainty and individuality of the property claimed apart from the ground on account of which it was claimed. But in later Roman law a condictio incerti, corresponding to an actio ex stipulatu for something unascertained in amount, is spoken of, perhaps with an intentio, quidquid paret dare facere oportere. Cf. Sohm, l. c.; Lenel, § 57.

In condictio certae pecuniae both the intentio (which names certa pecunia) and the condemnatio are certae. In condictio triticaria the intentio (which names some other certa res) is certa; the condemnatio (quanti ea res erit) is incerta. In condictio incerti both intentio and condemnatio are incertae, § 49, comm.

§ 6. Rights may be divided into primary and secondary. Primary rights are antecedent to wrong, such as ownership. Secondary or sanctioning rights imply an antecedent wrong, and their title is a breach of some primary right, as a breach of contract or a delict.

Both these classes of rights and the corresponding duties are creations of the law: for every law is both imperative and coercive; that is, both by its command confers a primary right and imposes a corresponding primary duty, and sanctions its command by conferring a secondary right and imposing a secondary duty, that is, by conferring a remedy and employing coercion in the event of disobedience.

The sanctions of the civil law are either reparative and remedial or punitory and preventive; and in one case the object of the law is the RESTORATION of the plaintiff by restitution or compensation, and then his primary right is the measure of his redress or sanctioning right; in the other case it is the repression of similar wrongs by inflicting a PUNISHMENT on the defendant which may operate as a terror to himself in future (reformatory) and to other wrongdoers (exemplary); and then the sanctioning right may far exceed his primary right. Even RESTORATION may embrace the mediate as well as the immediate value of the primary right, 3 § 212, comm.

The language of Roman jurisprudence makes no distinction between a primary right and a sanctioning right when the sanction is purely RESTORATIVE, even though it include indirect or consequential damages, calling both by the name of the Object (Res). The redress directly given by the Roman law under the formulary procedure was always pecuniary damages, and we might have expected Roman jurists above all others to distinguish between the objects of the plaintiff's primary and secondary right; but the indirect result of a real action might be the recovery of specific restitution, and it was in

view of this type of redress that the Roman lawyers were led to speak of the objects of primary and reparative secondary rights as identical.

If we next proceed to inquire what classes of actions are brought for reparation or to recover the object of a primary right (rei persecutio), and what for the recovery of a penalty (poenae persecutio), §§ 6-9, we shall have no difficulty in perceiving that real actions and actions on contract belong to the former class (rei persecutio); and that of actions on delict, some are reparatory, as e. g. condictio furtiva, while others have for their object a penalty (poenae persecutio), such as the actio furti, while in some again both objects are combined e. g. actio vi bonorum raptorum. Inst. 4, 6, 16-19. The effect of real actions and of actions on contract is restoration: they leave the plaintiff no richer and the defendant no poorer in respect of property than he was at first; whereas the purely penal actions leave the plaintiff, in respect of property, richer, and the defendant poorer. But the remaining divisions of actions on delict, those brought to recover indemnification for damage to property, are more ambiguous in character. If we merely regard their effect on the plaintiff they seem to be purely reparative, for they leave the plaintiff no richer; but if we regard their effect on the defendant they seem to be penal, for if the wrong done by the defendant was a destruction of property, compensation to the plaintiff will leave the defendant poorer. Those actions on delict, which may be called vindictive (quae ad ultionem pertinent, quae vindictam continent), as having for their special object the satisfaction of the injured feelings of the plaintiff, such as the actio injuriarum, have the effect of penalising the defendant, and so rather resemble the purely penal actions ex delicto than such as are merely reparatory.

We have seen, 3 § 212, comm., that, even under a contract, damages could include indirect losses or the mediate value of the primary right, and might, according to the limitation made by Justinian, Cod. 7, 47, 1, amount to twice the immediate value of the subject-matter of the obligation, where this can be ascertained: and that in the case of actions, founded on delict, damages, as distinct from penalty, were not restricted to any maximum.

But delictal actions, whether they are regarded as rei persecutio, or as poenae persecutio, or as mixtae, are generally subject to the following rules: they are not passively transmissible, i. e. they are not maintainable against the heir of the defendant, except so far as the inheritance he has succeeded to was enriched by the delict, unless there has been joinder of issue (lis contestata) against the wrongdoer, in which case the delictal obligation is novated, 3 § 180, and becomes passively transmissible; moreover, they are maintainable against each one of several delinquents for the entire damages (in solidum); and

they can be brought in the form of noxal actions against the paterfamilias or dominus. See Grueber, Lex Aquilia, p. 275. Moreover, Praetorian penal actions can, generally speaking, only be maintained within a year (annus utilis) from the commission of the delict.

It is to be noticed that in case of the death of the delinquent, the plaintiff had not always an adequate remedy under the Roman law, when the inheritance was not enriched by the delict, e. g. in the case of damage to property under the lex Aquilia; and English common law even went beyond the rule of Roman law in this respect, since its principle was that no action of Tort (a term which does not coincide with but is wider than that of Delict) would lie against the executor or administrator of the wrongdoer. [The maxim, actio personalis moritur cum persona, often used by expositors of English law, must have originated in a misprint of personalis for poenalis.] But now, by 3 and 4 Will. IV, c. 42, an action for injury to property, as opposed to actions for slander and the like (vindictive actions, which die with the person), is maintainable against the executors and administrators of the wrongdoer, provided the wrong was committed within six months before his death and the action is brought within a year after his death, if it was an injury to real property, or within six months after his executors or administrators have taken on themselves administration, if it was an injury to personal property. Thus within the limits of this statute the English plaintiff has an ampler remedy than the Roman. See Pollock's Law of Torts, Ch. III. § 2.

It should be remembered respecting the extinction of delictal actions (1) that by reason of death, Vindictive suits are incapable of either active or passive transmission (transmission to the heir of the plaintiff or against the heir of the defendant), other delictal actions being capable of active but incapable of passive transmission, § 111, comm.; (2) that by prescription, Praetorian Penal suits are generally limited to a year, while Civil actions are 'perpetuae,' §§ 110–113, comm.; (3) that in the case of concurrence, i. e. the merger, absorption, or alternation of several coexisting suits, one penal action may not consume another on account of the same offence. (As to the interpretation of the statement in the Institutes (4, 9, 1) numquam actiones praesertim poenales de eadem re concurrentes alia aliam consumit, see Dr. Moyle's note, and cf. Windscheid, Pandekten, 2 § 326, n. 8 & 9.) The importance of the distinction between reparatory and purely penal actions has disappeared in modern times in consequence of the desuetude of purely penal actions.

Damages in English law is a general term for the pecuniary sum awarded to the plaintiff in a civil action; i. e. a claim for damages includes not only compensation for loss of property, but also what is recovered in such actions, as those for assault or libel.

§ 7. One action upon contract, namely, the action against a depositary, was brought for double the value of the deposit, i. e. was partly penal, if the deposit was necessitated by fire, shipwreck, tumult, or similar distress.

§ 8. In Justinian's time it was fully established that the penalty of Rapine was only thrice the value of the thing taken with violence, that is, the quadruple damages were partly penal and partly reparatory; accordingly the actions vi bonorum raptorum and the real or personal action to recover the thing taken or damages could not also be brought, that is they were not concurrent or cumulative, Inst. 4, 6, 19. For a case of quadruple damages, of which ¼ was restorative and ¾ penal, under 9 Anne, c. 14, against Gaming, see Stephen's Blackstone, Introduction.

§ 9. The actio judicati was brought against a defendant to enforce the condemnation of the judex. If he defended this action he was liable to be condemned to pay twice the amount of the judgment debt, and was required to give security judicatum solvi. This security was the modern representative of the interposition of a Vindex in the old proceeding of manus injectio. In manus injectio pro judicato it seems the Vindex who lost the suit was condemned, as a penalty for his unwarranted interference, to pay a sum equal to the original judgment debt; in other words, to discharge the debtor he had to pay twice the amount of the debt. In manus injectio pura the defendant was so to say his own Vindex, and, if he lost, was condemned in double the debt. See §§ 21–25.

The actio depensi [see above, 3 § 127] was introduced by a lex Publilia of uncertain date, and as it was only given to the sponsor, would become obsolete when the sponsor was superseded by the fidejussor.

Legatum per damnationem no longer existed in the time of Justinian, who confined the action of the legatee against the heres for twice the value of the legacy to the case of bequests to churches and religious institutions. Inst. 3, 27, 7.

§ 10. Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sua ui ac potestate constant. quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

§ 11. Actiones quas in usu ueteres habuerunt legis actiones appellaba*n*tur uel ideo, quod legibus proditae erant (quip*p*e

§ 10. Some actions are moulded upon, and contain a reference to, the forms of statute-process; others are unrelated and independent. This makes some explanation of the statute-process system necessary.

§ 11. These actions, which our old jurisprudence employed, are called statute-process, either because they were appointed by

tunc edicta praetoris, quibus conplures actiones introductae sunt, nondum in usu habebantur), uel ideo, quia ipsarum legum uerbis accommodatae erant et ideo inmutabiles proinde atque leges obseruabantur. unde eum, qui de uitibus succisis ita egisset, ut in actione uites nominaret, responsum est rem perdidisse, cum debuisset arbores nominare eo, quod lex XII tabularum, ex qua de uitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

§ 12. Lege autem agebatur modis quinque: sacramento, per iudicis postulationem, per condictionem, per manus iniectionem, per pignoris capionem.

§ 13. Sacramenti actio generalis erat; *de* quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur. eaque actio proinde periculosa erat | falsi———, atque hoc tempore periculosa est actio cer|tae creditae pecuniae propter sponsionem qua periclitatur reus, si temere neget, ⟨*et*⟩ restipulationem qua periclitatur actor, si non debitum petat; nam qui uictus erat summam sacramenti praestabat poenae nomine, eaque in publicum cedebat praedesque eo nomine praetori dabantur, non ut nunc sponsionis et restipulationis poena lucro cedit aduersario qui uicerit.

§ 14. Poena autem sacramenti aut quingenaria erat aut quinquagenaria. nam de rebus mille aeris plurisue quingentis assibus, de minoris uero quinquaginta assibus sacramento con-

statute before the edict of the praetor, the source of many new actions, began to be published, or because they followed the statute itself and therefore were as immutable as the statute. Thus, it was held that a man who sued another for cutting his vines, and in his action called them vines, irreparably lost his right because he ought to have called them trees, as the enactment of the Twelve Tables, which confers the action concerning the cutting of vines, speaks generally of trees and not particularly of vines.

§ 12. There were five forms of statute-process, Sacramentum, Judicis postulatio, Condictio, Manus injectio, and Pignoris capio.

§ 13. The actio sacramenti was the general form of action, for wherever no other mode was appointed by statute, the procedure was by sacramentum. It was a form of action attended with risk to the parties, like the modern action to recover money lent, wherein the defendant and plaintiff by the sponsio and restipulatio respectively forfeit a penal sum, if unsuccessful. Accordingly the party who was beaten had to pay the amount of the stake (summa sacramenti) by way of penalty; but it went to the public treasury, sureties on this account having to be given to the Praetor, instead of going as it does now by sponsio and restipulatio to the profit of the winning side.

§ 14. The penal sum of the sacramentum was either five hundred asses or fifty asses; five hundred when the object of dispute was valued at a thousand or upwards, fifty when at less than

tendebatur; nam ita lege XII tabularum cautum erat. ⟨*at*⟩ si de liber*tate* hominis controuersia erat, etiamsi pretiosissimus homo esset, tamen ut L assibus sacramento contenderet*ur*, eadem lege cautum est fauor*e* scilicet libertatis, ne o*ne*rarentur adsertor*es*. —

(11 *uersus in C legi nequeunt*)

——|——

§ 15. omnes actiones———

(5 *uersus in C legi nequeunt*)

———|——captus—|

(5 *uersus in C legi nequeunt*)

———————|——ad iudicem accipiendum uenirent; postea u*ero* reuersis dabatur. ut autem ⟨*die*⟩ XXX iudex d*ar*etur, per legem Pinariam factum est; ante eam autem lege*m stat*im dabatur iudex. illud ex superioribus intellegimus, si de re minoris qua*m* ⟨M⟩ aeris agebatur, quinquagenario sacramento, non quingenario eos contendere solitos fuisse. postea tamen quam iudex datu*s* esset, conperendinum diem, ut ad iudicem uenirent, denuntiabant. deinde cum ad iudicem uenerant, antequam apud eum *causam* perorarent, solebant breuiter ei et quasi per indicem rem exponere; quae dicebatur causae co*ni*ectio, quasi causae suae in breue coactio.

§ 16. Si in rem agebatur, mobilia quidem et mouentia, quae modo in ius adferri adducique possent, in iure uindicabantur ad hunc modum: qui uindicabat *f*estucam tenebat; deinde ipsam rem adprehendebat, ueluti hominem, et ita dicebat HVNC EGO HOMINEM EX IVRE QVIRITIVM MEVM ESSE AIO SECVNDVM SVAM CAVSAM. SICVT

a thousand. This was provided by the law of the Twelve Tables. When, however, personal freedom was the subject of dispute, however valuable a slave the man whose status was litigated might be, the penal sum was only fifty asses. This was enacted by the Twelve Tables in favour of liberty, in order that the vindex or assertor of liberty might never be deterred by the magnitude of the risk.

§ 15. [When the sacramentum was a personal action, that is to say, instituted to enforce an obligation, after giving securities for the stake, the parties left the praetor's court, having arranged to reappear on the thirtieth day] to receive a judex. When they appeared again the Praetor nominated a judex. This was in pursuance of the lex Pinaria, before which the judex was named at once. If the object of dispute was worth less than a thousand asses, the stake, as before mentioned, was only fifty. After the judex was named, they gave mutual notice to appear before him on the next day but one. At the appearance before the judex, before the case was fully developed, it was stated in a concise and summary form, and this summary statement was called causae conjectio.

§ 16. When the sacramentum was a real action, movables and animals that could be brought or led into the presence of the magistrate were claimed before him in the following fashion. The vindicant held a wand, and then grasping the object itself, as for instance a slave, said: 'This man I claim as mine by due acquisition, by the law of the Quirites. See! as

DIXI, ECCE TIBI, VINDICTAM INPOSVI, et simul homini festucam inponebat; aduersarius eadem similiter dicebat et faciebat; cum uterque uindicasset, praetor dicebat MITTITE AMBO HOMINEM; illi mittebant; qui prior uindica⟨*uerat, ita alterum interroga*⟩bat POSTVLO ANNE DICAS, QVA EX CAVSA VINDICAVERIS; ille respondebat IVS FECI SICVT VINDICTAM INPOSVI; deinde qui prior uindicauerat, dicebat QVANDO TV INIVRIA VINDICAVISTI, D AERIS SACRAMENTO TE PROVOCO; aduersarius quoque dicebat similiter ET EGO TE; scilicet ⟨*si de re* M *aeris plurisque agebatur*, D, *si de minoris*,⟩ L asses sacramenti nominabant; deinde *eadem* sequebantur quae cu*m* in persona*m* ageretur; postea praetor secundum alterum eorum uindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes aduersario dare litis et uindiciarum, id est rei et fructuum; alios autem praedes ipse praetor ab utroque accipiebat sacramenti, quod id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, *quod maxi*me sua esse credebant quae ex hostibus cepissent; unde in centum*ui*ralibus iudiciis hasta praeponitur.

I have said, I have put my spear (vindicta) on him,' whereupon he laid his wand upon the man. The adversary then said the same words and performed the same acts. After both had vindicated him, the praetor said: 'Both claimants quit your hold,' and both quitted hold. Then the first claimant said, interrogating the other: 'Answer me, will you state on what title you found your claim?' and he replied: 'My putting my spear over him was an act of ownership.' Then the first vindicant said: 'Since you have vindicated him in defiance of law, I challenge you to stake as sacramentum five hundred asses': the opposite party in turn used the same words, 'I too challenge you.' That is to say, if the thing was worth more than a thousand asses, they staked five hundred asses or else it was only fifty. Then ensued the same ceremonies as in a personal action. The praetor then awarded to one or other of the claimants possession of the thing pending the suit, and made him bind himself with sureties to his adversary to restore both the object of dispute and the mesne profits or value of the interim possession, in the event of losing the cause. The praetor also took sureties from both parties for the stake (summa sacramenti) which the loser was to forfeit. Now the wand which they used represented a lance, the symbol of absolute dominion, for what a man had captured from the enemy was held to be most distinctly his own. Accordingly in Centumviral trials (where questions of inheritance are decided) a lance is set up in front as an ensign or symbol.

§ 17. Si qua res talis erat, ut sine incommodo non posset in

§ 17. If the object of dispute was such as could not conveniently

ius adferri uel adduci, ueluti si columna aut grex alicuius pecoris esset, pars aliqua inde sumebatur; deinde in eam partem quasi in totam rem praesentem fiebat uindicatio. itaq*u*e ex gre*ge* uel una *o*uis aut capra in ius adducebatur, uel et*iam* pilus i*n*de sumebatur et in ius adferebatur, ex naue uero et columna aliqua pars defringebatur. similiter si de fundo uel de aedibus siue de hereditate controuersia erat, pars aliqua inde sumebatur et in ius adferebatur et in eam partem perinde atque in totam rem praesentem fiebat uindicatio, ueluti ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controuersia erat, aeque——

be carried or led before the praetor, as for instance a column, or a herd of cattle, a portion was brought into court, and the formalities were enacted over it as if it were the whole. Thus if it was a flock of sheep or herd of goats, a single sheep or goat, or even a single tuft of hair was taken before the magistrate; if it was a ship or column, a fragment was broken off and brought similarly; if it was land, a clod; or if it was a house, a tile; and if it was a dispute about an inheritance, then in the same way . . . . . .

(48 *uersus in C perierunt*)

——————qualem———— capiendum iudicio | —die XXX ad iudicem capiendum praesto esse de|be*bant*.

. . . . on the thirtieth day when they were bound to appear in court to receive a judge.

§ 18. *Con*dicere autem denuntiare est prisca lingua. itaque haec quidem actio proprie condictio uocabatur; nam *a*ctor aduersario denunti*a*bat, ut ad iudicem capiendum die XXX adesset. nunc uero non proprie condictionem dicimus actionem in personam ⟨*esse, qua*⟩ intendimus *DARI* NOBIS OPORTERE; null*a* enim hoc tempore eo nomine denuntiatio fit.

§ 18. Condicere in old Latin was equivalent to denuntiare, to give notice. Hence this action was appropriately called condictio (notice), for the plaintiff used to give notice to the defendant to appear before the praetor on the thirtieth day to receive a judge. The name is now applied with less propriety to a personal action by which we sue for a transfer of property, for notice forms no part of the procedure.

§ 19. Haec autem legis actio constituta est per legem Siliam et Calpurniam, lege quidem Silia certae pecuniae, lege uero Calpurnia de omni certa re.

§ 19. This form of statute-process was created by the lex Silia and lex Calpurnia, being prescribed by the lex Silia for the recovery of a certain sum, and extended by the lex Calpurnia to the recovery of any other certain thing.

§ 20. Quare autem haec actio desiderata sit, cum de eo quod

§ 20. Why a new action was needed, when an obligation to

nobis dari oportet, potuerimus aut sacramento aut per iudicis postulationem agere, ualde quaeritur.

transfer property to a person could be enforced either by Sacramentum or by Judicis postulatio, is a question much discussed.

§§ 10–17. The discovery of the MS. of Gaius by Niebuhr threw a flood of light on the history of Roman Civil Procedure, and not least on the early process by legis actio. Although the forms of legis actio had only an historical interest at the time when Gaius wrote, he begins his account of procedure by noticing them, because, as he tells us, § 10, the actions which were then in use had been to some extent founded on them. (For the literature concerning the legis actiones see Muirhead, § 13.)

The term legis actio is correlative to lege agere, and thus means action determined by lex, i. e. the Twelve Tables and other leges, § 11, agere signifying the observance of the formal acts prescribed by law for prosecuting legal claims. (Cf. Nettleship, Contr. to Latin Lexicog., s. v. actio.) The legis actiones were either legal forms preparatory to bringing a case to trial, or prescribed forms for obtaining execution, rather than actions in the strict sense. To the first class belong the actio sacramenti, per judicis postulationem, and per condictionem; to the latter per manus injectionem and per pignoris capionem. The deposit of a sacramentum by the two parties to a dispute to bring the matter to an issue was the basis of what seems to be the earliest legis actio. In contrast with the other legis actiones the actio sacramenti was a general one, § 13, de quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento ageretur.

The forms of action per judicis postulationem and per condictionem seem to have been introduced subsequently with a more limited object. Thus the legis actio sacramenti is both in rem and in personam. But of the procedure in personam we have no information on account of the lacuna in the MS. § 15, which can only be filled up in a general sense. Instead of the assertion of ownership, as in vindicatio, the creditor would claim from the debtor his debt—aio te mihi x milia aeris dare oportere. Instead of a contra-vindicatio there would be a denial on the part of the debtor of the obligation, and on this denial the summa sacramenti would be staked in a manner corresponding to that which was followed in the actio in rem. The proceedings would be simpler and less archaic in character than in the real action. Whether, as has been suggested, the actio sacramenti was at first always a claim to a thing, which in the case of a debt would be the body of the debtor, we do not know, but the conception of obligation is so rudimentary in early times, as to make it not improbable. (Cf. Brinz, Grünhut's Zeitschr. 1, 23; Muirhead, § 34.)

The sacramentum or money solemnly staked was, it would seem, originally deposited with the Pontifex and applied, when forfeited, to meet the expenses of the public sacrifices; whence its name. (According to Varro de L. L. 5, 180, it was deposited ad Pontem; for different interpretations of this passage see Muirhead, Appendix, N. E.) Afterwards, instead of an actual deposit, security [praeves, praevides, Lex Agr. C. I. L. 1, 200, 46, manceps, praevides, praediaque. According to Nettleship (op. cit. Praes), Praes was originally in all probability an adjective, meaning ready, praes and vas being thus distinguished: Praes is the security for a payment or performance of a contract, while Vas is the security for a person's appearance in court. Cf. Varro 6, 74, 'Sponsor' et 'Praes' et 'Vas' neque idem .... Itaque Praes qui a magistratu interrogatus in publicum ut praestet... dicit 'Praes.' Vas appellatur qui pro altero vadimonium promittit] for the penal sum was given by both parties to the praetor. Sohm (§ 48, n. 2) supposes that a sacramentum was originally not merely a stake of money against money, but of oath against oath (i. e. sacramentum in its ordinary sense), and hence on account of the force attaching to oaths was binding on the magistrate, but this is only conjectural.

In the ceremony as described by Gaius we may distinguish three stages: first, an oral pleading or altercation, alluded to in the subsequent words 'sicut dixi'; secondly, a trial by battle, the original method of deciding disputed rights; and thirdly, the reference to peaceful adjudication. We may suppose that on a memorable day in the progress of civilization, before the combat had terminated fatally to one of the combatants, some one like Numa Pompilius, of sufficient authority to make so great an innovation, interposed and induced the parties to refer the dispute to arbitration. The case would afterwards serve as a model and precedent to future litigants; but, from a superstitious fear of losing the sanction of immemorial custom, the earlier stages of the process would still continue to be mimicked in solemn pantomime. So, in English law, trial by Wager of battle, introduced by William the Conqueror, was first partially superseded by the Grand assize, or trial by jury, an alternative substituted by Henry II, and was finally abolished in the reign of George III. 'The tenant [defendant] shall not be received to wage battle, nor shall issue be joined, nor trial had, by battle, in any writ of right,' 59 Geo. III, ch. 46.

The use of the rod or wand as representative of the spear, the symbol of dominion, may be paralleled in English law by the delivery of a staff as the symbol of power and possession in the conveyance of copyholds. 'The conveyance of copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod

or verge, and then from the lord to the purchaser by redelivery of the same in the presence of a jury of tenants,' Blackstone, 2, 20.

§ 16. The specification of the title or ground of claim (expressio causae) in a real action (secundum suam causam, sicut dixi) may have been, as Bethmann-Hollweg supposes (R. C. P. 1, 139), limited to actions where the object claimed was a person, and was then designed to distinguish whether the person was claimed as a son, wife, bondsman (mancipium), or slave. See 1 § 134, comm. More probably, however, it was universally required in statute-process, though not in the formulary system, for the purpose of ascertaining in all cases the ground on which each party claimed, as whether it was on account of a mancipation, a surrender before the magistrate, or usucapion, 2 § 43, comm.

After completing his account of Sacramentum, Gaius probably proceeded to explain the nature of Judicis postulatio in the 48 lines of the MS., § 17 *a*, which are wanting, though in the latter part of them he had gone on to treat of the condictio. Of its process we have a fragment in the formula derived from Valerius Probus, the first two letters of which, however, are very doubtful: Te, Praetor, judicem arbitrumve postulo uti des, 'I pray you, Praetor, to appoint an arbiter or judge.' It seems to be distinguished from actio sacramenti in personam and from condictio not only in respect of its form, but by the greater freedom allowed to the judex or arbiter, appointed by the Praetor, at the request of one of the parties, to try the suit. Thus it was apparently the prototype of actions bonae fidei, as opposed to actions stricti juris, that is of actions for enforcing obligations which might require an equitable balancing by the judex or arbiter of opposite claims, and an assessment by him of such damages as good faith required to be paid to the plaintiff. It would thus be suitable in cases for which the actio sacramenti in personam would supply an insufficient remedy. A party taking advantage of this procedure would have to show that his case came under the provisions of the Twelve Tables, or of some other lex, and that it was suitable to an arbitrium. The actions Finium regundorum, Familiae herciscundae, Aquae pluviae arcendae, de arboribus succisis, which are mentioned in or derived from the Twelve Tables, appear to have been tried by an arbiter or arbiters, that is, to have been forms of Judicis postulatio. For an account of views of different writers respecting the origin and nature of judicis postulatio see Muirhead, Roman Law, § 35.

The phrase manum conserere is sometimes used, though not by Gaius, in reference to the actio sacramenti (Cic. pro Mur. 12, 26 ; Gell. 20, 10; Varro, L. L. 6, 64), meaning, perhaps, the act of the parties in laying hold at the same time of the object in dispute or engaging in a conflict about it. This mimic conflict originally took place on the

land itself, which was vindicated, in the presence of the magistrate (in jure manum conserere), but later a practice grew up, which is referred to by Cicero, for the parties, by order of the magistrate, going by themselves attended by witnesses to the place, and after duly observing the ceremonial returning to the Court. Finally this was discontinued, and as we see by the text, § 17, a part of the thing was brought in the first place before the magistrate to represent the whole.

After the vindication and counter-vindication had taken place, the praetor had to assign interim possession of the vindiciae, or object which was claimed, to one of the parties, and to take security from him that he would be ready to produce this object of litigation (called here lis, cf. Cic. Mur. 12, 27) and the mesne profits, which are denoted by the term vindiciae (praedes litis et vindiciarum). Gaius gives no indication of the principle on which the praetor acted in making this assignment, simply saying secundum alterum eorum vindicias dicebat. In later process the possessor, who was the defendant in the action, would be allowed to remain in possession, on giving security that he would satisfy the judgment, and it would be for the vindicant to prove his title. The difference here is that the two parties stand on an equal footing, each of them in turn vindicating the thing, and so neither of them being in the position of defendant. It seems reasonable, however, to suppose that the praetor would be governed by the same motives in making his award as influenced him in granting the possessory interdicts, so that the party seeking to evict the other would not as a rule obtain possession till he had proved his title.

The Condictio was unknown to the Twelve Tables, having been created by the lex Silia of a somewhat later but uncertain date, and extended by the lex Calpurnia, the date of which is also uncertain. We see by the text, § 20, that the reason for instituting another actio in personam, when the actio sacramenti and per judicis postulationem were already available, was not clear to the jurists at the time when Gaius wrote. But the object of the Lex Silia in instituting the condictio may have been to supply a more prompt and efficient remedy for the recovery of money debts than previously existed, a reform in procedure which would be required when summary execution on account of nexum was abolished. By this new form of action a creditor could forthwith give notice to his debtor, called condictio, from which the proceeding derives its name, to appear before the magistrate in thirty days to have a judex appointed. If, as there is some reason for thinking, the serving of this notice was an extra-judicial act, it would be easily executed by the party interested. And should the debt not have been satisfied within the thirty days, the creditor was entitled to a judicium, depending on a simple and clearly defined issue. Thus the proceedings in jure would be much curtailed.

Moreover, condictio had the advantage that it could be accompanied by the sponsio and restipulatio, § 13, a wager entered into by mutual stipulations of the parties conditioned for the forfeiture by the vanquished to the successful party instead of to the treasury of one third of the sum in dispute, in addition, on the part of the defendant, to the original debt, § 171. The stake or penalty is called by Cicero legitima pars, 'statutable sum': Pecunia petita est certa; cum tertia parte sponsio facta est. . . . Pecunia tibi debebatur certa quae nunc petitur per judicem, in qua legitimae partis sponsio facta est, Pro Roscio, 4, 5: whence we may suppose that this stake or penalty was fixed by the lex Silia, the statute which created the procedure by condictio.

At this period then, on account of the advantages of judicis postulatio and condictio, the Sacramentum would be practically confined to Real actions before the Centumviral Court: Condictio would be the appropriate Personal action for recovering a certain sum or thing due upon a mutuum, which had taken the place of nexum, and also for enforcing a promise made by stipulation to pay certa pecunia or certa res, such promise by stipulation being perhaps first made actionable by the lex Silia, while the same process would be applicable to a transcripticium nomen; and Judicis postulatio was possibly the appropriate action in the case of arbitria, and for enforcing obligations to reconvey property which had been mancipated subject to a fiducia. But it must be remembered that the law of contract was at this time confined within narrow limits.

§ 21. Per manus iniectionem aeque ⟨*de*⟩ his rebus agebatur, de quibus ut ita ageretur, lege *aliqua* cautum est, ueluti iudicati lege XII tabularum. quae actio talis erat: qui agebat, sic dicebat QVOD TV MIHI INDICATVS (siue DAMNATVS) ES SESTERTIVM X MILIA, QVANDOC NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIVM X MILIVM IVDICATI MANV*M* INICIO, et simul aliqua*m* partem corporis eius pre*h*endebat. nec licebat iudicato manum sibi depellere et pro se lege agere; sed uindicem dabat, qui pro se causam agere solebat; q*ui* uindicem non dabat, do*m*um ducebatur ab actore et ui*n*ciebatur.

§ 22. Postea quaedam leges

§ 21. Manus injectio was the procedure specially prescribed by statute in certain circumstances; as, for instance, against a judgment debtor by the law of the Twelve Tables. The procedure was as follows: the plaintiff said, 'Whereas you have been adjudged or condemned to pay me ten thousand sesterces, which sum you have failed to pay, therefore I arrest you as judgment debtor for ten thousand sesterces,' and at the same time laid hands on him; and the debtor was not allowed to resist the arrest, or use the statute-process in his own defence, but gave a vindex to advocate his cause, or, in default, was taken prisoner to the plaintiff's house, and put in chains.

§ 22. Afterwards manus in-

ex aliis quibusd*a*m causis pro iudicato manus iniectionem in quosd*a*m dederunt: sicut lex Publilia in eum, *pro* quo sponsor depe*n*disset, *si* in sex mensibus proximis, quam pro eo depensum esset, non soluisset sponsori pecuniam; item lex Furia de sponsu aduersus eum, qui a sponsore plus quam uirilem partem exegisset; et denique conplures aliae leg*es* in multis causis talem actionem dederunt.

§ 23. Sed aliae leges *ex quibusdam causis* constituerunt quasdam actiones p*er* manus iniectionem, sed puram, id est non pro iudicato: ueluti le*x* ⟨*Furia*⟩ testamentaria aduers*us* *e*um, qui legatorum nomine mortisue causa plus *M* assibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia aduersus faeneratores, ut si us*u*ras exegissent, de his reddendis per manus iniectionem cum eis ageretur.

§ 24. Ex quibus legibus et si quae aliae similes essent, cum agebatur, ⟨*reo licebat*⟩ manum sibi depellere et pro se lege agere. nam et actor in ipsa legis actione non adiciebat hoc uerbum PRO IVDICATO, sed nominata causa ex qua agebat ita dicebat OB EAM REM EGO TIBI MANVM INICIO; cum hi, quibus pro iudicato actio data erat, nominata causa ex qua ageba*n*t ita infereba*n*t OB EAM REM EGO TIBI PRO IVDICATO MANVM INICIO. nec me praeterit in forma legis Furiae testamentariae PRO IVDICATO uerbum inseri, cu*m* in ipsa lege non sit; quod uidetur nulla ratione factum.

jectio was given by various laws against quasi judgment debtors, as by the lex Publilia against the principal whose debt had been paid by his sponsor, unless he indemnified his sponsor within six months from the payment of the debt; by the lex Furia de Sponsu against the creditor who had exacted from one of several sponsors more than his ratable share; and by various other statutes in a number of cases.

§ 23. Other statutes established that certain actions on particular grounds should be enforced by manus injectio, but it was simple manus injectio, not that applicable to quasi judgment creditors: as the lex (Furia) testamentaria in the action against the legatee or donee in contemplation of death who received more than a thousand asses if not included in certain classes privileged by that statute; and the lex Marcia against usurers compelled those who exacted interest on a loan to refund by manus injectio.

§ 24. These statutes and certain others permitted the defendant to resist arrest and use the statute-process in his own defence, for in this case the plaintiff could not in carrying on the statute-process add the term quasi judgment debtor, but, after naming his cause of action, said simply, 'I therefore arrest you'; whereas, if he proceeded as quasi judgment creditor, after naming the cause he said, 'Therefore I arrest you as quasi judgment debtor.' I am aware that in proceeding under the lex Furia testamentaria the plaintiff added the words, 'As quasi judgment debtor,' though they are not inserted in the law; but this seems to have been done in an irrational way.

§ 25. Sed postea lege Vallia, excepto iudicato et eo pro quo depensum est, ceteris omnibus, cum quibus per manus iniectionem agebatur, permissum est sibi manum depellere et pro se agere. itaque iudicatus et is pro quo depensum est etiam post hanc legem uindicem dare debeba*nt*, et nisi darent, domum ducebantur. *id*que quamdiu legis actiones in usu erant, semper ita obseruab*a*tur; unde nostris temporibus is, cum quo iudicati depensiue agitur, iudicat*um* solui satisdare cogitur.

§ 25. But subsequently the lex Vallia permitted all defendants sued by manus injectio, except the judgment debtor and the principal indebted to his sponsor, to resist arrest and use the statute-process themselves in their own defence. Hence, the judgment debtor and the principal indebted to his sponsor for payment (depensum) had even after this law was passed either to give a vindex or else were carried off to the creditor's house; and this practice lasted as long as statute-process was in force. And thus it is that at the present day the defendant in the actio judicati and in the actio depensi must give security for the payment of the sum in which they may be condemned.

For the proceedings in Manus injectio cf. 3 § 77, comm.

Manus injectio seems to have had two meanings:

(1) Self-help, or redress of the plaintiff by his own act, when the creditor arrested the debtor privately by his own authority.

In this case the award of a magistrate (addictio) would not be a necessary preliminary to abduction (secum duci): but self-redress was, as a general remedy, only tolerated when society was very loosely consolidated; and abductio without preceding addictio must at an early period have become, except in particular cases, illegal. The final blow struck by the state at Self-help was the constitution of the three emperors, A.D. 389, 3 § 209, comm.

But a creditor was entitled to arrest his debtor of his own accord, subject to certain formalities, till a comparatively late time in case of resistance to in jus vocatio; Si calvitur pedemve struit, manum endo jacito, Fragment of the Twelve Tables, Tab. 1. 'If the defendant on being summoned to appear before the magistrate tergiversates or attempts to flee, the plaintiff may proceed to Manus injectio.'

We may conjecture also that avoidance of in jus vocatio by latitation or keeping house rendered a defendant liable to manus injectio. Such is the probable explanation of two fragments of the Twelve Tables, Tab. 1: Si in jus vocat, ito. Ni it, antestamino, igitur em capito. . . . Tab. 2, 3: Cui testimonium defuerit, is tertiis diebus ob portum obvagulatum ito. 'On a service of summons to appear before the magistrate, if the defendant refuse obedience, the plaintiff shall obtain attestation of the fact, and then take him by force. In default

of such attestation (i. e. if the defendant avoid service by keeping out of the way) the plaintiff on three market-days shall stand before the defendant's door and wawl (loudly summon him to appear (?), and after this the defendant shall be liable to manus injectio).' Compare the Hindoo custom of 'sitting dharna,' i. e. fasting at the door of a debtor. See Maine's Early History of Institutions, pp. 40, 297–298.

(2) Manus injectio ceased to be a mere act of legalized self-redress, and became the part of a statute-process (legis actio) whenever it took place before the magistrate, either a Vindex interposing, or, in manus injectio pura, in case of the alleged debtor becoming himself and not by means of a vindex defendant in a judicium for determining whether he was liable to the process, Ihering, 11, c. The vindex (the word is like vindicatio and vindiciae derived from vim dicere) was in an analogous position to the assertor libertatis, since a person who was himself the object of a suit could not himself be defendant in it. A debtor who was addicted to his creditor did not, however, thereby lose either his freedom or his citizenship, though incapable while his confinement lasted of exercising his rights.

The right of a creditor to carry off his debtor under the award (addictio) of a magistrate, might either be founded on a previous judgment against the debtor (judicatus), or be given by some special statute against other debtors who were treated as judgment debtors (pro judicato). In both these cases the debtor could only defend himself by a vindex. But in some cases where manus injectio came to be allowed, as Gaius explains, § 24, the process was made less harsh, and the defendant was allowed to defend himself without supplying a vindex (manus injectio pura). It is to be noticed that Gaius does not refer to the case of the debtor bound in early law by nexum and subject to manus injectio, cf. 3 §§ 88, 89.

§§ 22–25. The lex Furia de sponsu (3 § 121), (as to the date of this law and the question whether it is referred to by Cicero see Karlowa, Röm. Rechtsgesch. 2, 735, and Roby 2, 30, n. 2), limited the obligation of the sponsor and fidepromissor to two years, and divided it equally among all the sponsores and fidepromissores without regard to their solvency.

The word exegisset suggests that the lex Furia de sponsu was not a lex perfecta;—that the limitation of the sponsor's liability to a proportionate part of the principal debt was only effected by a penalty being imposed on the creditor who exacted the whole obligation.

If we assume with Ihering that the lex Furia de sponsu and the lex Furia testamentaria (2 § 225) were separate clauses of the same enactment, we can understand why manus injectio pro judicato, which was expressly made the remedy in lex Furia de sponsu, was extended by interpretation to lex Furia testamentaria: although this

extension, according to Gaius, § 24, violated the rules of statute-process, which ought to rest in its minutest details on the express provisions of a statute.

The lex Marcia is an early law of uncertain date, cf. Livy, 7, 21. Its poena, like that of lex Furia testamentaria, was quadruplum: Cato de Re Rustica, quoted by Gellius.

The general opinion now is that execution against an insolvent debtor in the old Roman law was always directed immediately against the person of the debtor; it is certain that execution against his entire property, under the name of Bonorum venditio, 3 § 77, was a later invention of the Praetor. Savigny, however, supposes that under the law of the Twelve Tables itself execution against the person was confined with certain exceptions to judgments on an actual loan of money, and that execution on other judgments was always against the estate: and by this view, he seeks to throw light on an obscure problem, the nature of the ancient contract of Nexum.

A case, other than a judgment debt, in which the creditor might proceed by Manus injectio seems to be, besides those mentioned in the text, Furtum manifestum, 3 § 189.

With liability to Manus injectio for a quasi judgment debt we may compare the arrest of an absconding debtor in the English law by a writ of capias ad respondendum. As the Roman debtor had to find a vindex or responsible representative, so the English debtor must either remain in custody or put in bail, that is, find sureties who will undertake that, if judgment is obtained against him, either he shall surrender into custody, or shall pay the debt and costs recovered, or that they themselves will pay them for him. The Roman Vindex apparently became responsible for twice the amount of the original debt.

§ 25. Bethmann-Hollweg, 2 § 111, conjectures that under the formulary procedure actio judicati, when the judicium was legitimum (§ 103), was fictitious, and had a formula like the following: Quod Numerius Negidius Aulo Agerio sestertium decem milia condemnatus est, Si Aulus Agerius Numerio Negidio manus injecisset: tum quidquid Numerium Negidium Aulo Agerio dare facere oporteret: ejus, judex, Numerium Negidium Aulo Agerio duplum condemna. If the judicium was imperio continens, he supposes that the actio judicati was in factum with the following formula: Si paret Numerium Negidium Aulo Agerio sestertium decem milia condemnatum esse eamque pecuniam intra legitimum tempus solutam non esse: quanti ea res erit, tantae pecuniae duplum judex Numerium Negidium Aulo Agerio condemna. (But see in respect of these highly conjectural formulae Lenel's very unfavourable remarks. Das Edictum Perpetuum, p. 354, &c.) Under the later emperors when the formu-

lary procedure was abolished, the actio judicati as a means of execution was superseded by a more direct process generally in the form of Pignoris capio. Thirty days were allowed for payment, 3 § 78; then interest began to run at 24 per cent. per annum (duo centesimae per month) which Justinian reduced to 12 p. c.

§ 26. Per pignoris capionem lege agebatur de quibusdam rebus moribus, ⟨*de quibusdam rebus*⟩ lege.

§ 26. Pignoris capio (distress) was employed in some cases by virtue of custom, in others by statute.

§ 27. Introducta est moribus rei militaris. nam et propter stipendium licebat militi ab eo qui *ae*s tr*ib*uebat, nisi daret, pignus capere; dicebatur autem ea pecunia, quae stipendii nomine dabatur, aes militare. item propter eam pecuniam licebat pignus capere, ex qua e*quus* emendus erat; quae pecunia dicebatur aes equestre. item propter eam pecuniam, ex qu*a* hordeum equis erat conparandum; quae pecunia dicebatur aes hordiarium.

§ 27. By custom, in obligations connected with military service; for the soldier could distrain upon his paymaster for his pay, called aes militare; for money to buy a horse, called aes equestre; and for money to buy barley for his horse, called aes hordiarium.

§ 28. Lege autem introducta est pignoris capio ueluti lege XII tabularum aduersus eum, qui hostiam emisset nec pretium redderet; it*em* aduersus eum, qui mercedem non redderet pro eo iumento, quod quis ideo locasset, ut inde pecuniam acceptam in da*p*em, id est in sacrificium, inpenderet. item lege censoria data est pignoris ca*p*io publicanis uectigalium publicorum populi Romani aduersus eos qui aliqua leg*e* uectigalia deberent.

§ 28. By statute as by the law of the Twelve Tables which rendered liable to distress on default of payment the buyer of a victim and the hirer of a beast of burden lent to raise money for a sacrifice to Jupiter dapalis. So too the law of the Censors gave the power of distress to the farmers of the public revenue of the Roman people (publicani) against those in default for taxes (vectigalia) due under any statute.

§ 29. Ex omnibus autem istis causis certis uerbis pignus capiebatur, et ob id plerisque placebat hanc quoque actionem legis actionem esse; quibusdam autem ⟨*contra*⟩ placebat, primum quod pignoris ca*p*io extra

§ 29. As in all these cases the distrainor used a set form of words, the proceeding was generally considered a form of statute-process. Some, however, held otherwise, because it was performed in the absence of the

ius peragebatur, id est non apud praetorem, plerumque etiam absente aduersario, cum alioquin ceteris actionibus non aliter uti possent quam apud praetorem praesente aduersario, praeterea quod nefasto quoque die, id est quo non licebat lege agere, pignus capi poterat.

praetor and generally of the debtor; whereas the other forms of statute-process could only be enacted in the presence of the praetor and the adversary; besides, it could take place on an unlawful day (dies nefastus) (2 § 279), that is, on a day when statute-process was not allowed.

§§ 26–29. Distress in English law bears a certain resemblance to Execution. Each is the application of constraint to a defendant's will by seizure of his goods. But making a distress is a legalized act of self-redress by a private person, as of a landlord for securing his rent, and may take the place of or precede an action: execution follows after judgment obtained in an action, and is the act of the executive at the command of the sovereign. The pignoris capio of the older Roman law corresponded to distress; the pignoris capio of the formulary system generally was a mode of execution.

Perhaps pignoris capio, like manus injectio, was itself simply an act of regulated Self-redress, when there was no other legal remedy available, and did not amount to legis actio unless it led to a suit in which the legality of the distraint was brought into question. Cf. Sohm, § 48, and the literature there cited.

Pignoris capio in the older system of procedure was a remedy allowed in cases of a public character, that is, in claims relating to military service, to religion, or to the revenue. In the first case, § 27, the remedy was established by custom, that is, was anterior to the Twelve Tables; in the second case, § 28, it was given by the Twelve Tables; in the third case, § 28, it was created by law subsequent to the Twelve Tables.

We have mention of the aes equestre and hordiarium, § 27, in Livy's account of the Servian constitution, Livy 1. 43. 'Each soldier received ten thousand asses for the purchase of a horse, and for its maintenance a widow was assigned, who was bound to pay two thousand asses a year.'

The institution appears to have been transplanted from Greece. Cicero mentions it as in force at Corinth, De Republica, 2, 20, 36. 'Tarquinius Priscus instituted the present organization of the cavalry. At Corinth, whence he came, there was a practice of allotting horses at the public expense and taxing the childless and widows for their maintenance.' The private persons thus appointed military paymasters appear to have been called tribuni aerarii, Gellius 7, 10. In later times soldiers were paid by the Quaestors from the public treasury.

We have something similar in the Laws of Plato: *περὶ δὲ . . . λειτουργιῶν, ὁπόσα περὶ θυσίας εἰρηνικῆς ἢ πολεμικῶν εἰσφορῶν εἵνεκα, πάντων τῶν τοιούτων τὴν πρώτην ἀνάγκην ἰατὴν εἶναι τῆς ζημίας τοῖς [δὲ] μὴ πειθομένοις ἐνεχυρασίαν τούτοις, οἷς ἂν πόλις ἅμα καὶ νόμος εἰσπράττειν προστάττῃ, τῶν δὲ ἀπειθούντων ταῖς ἐνεχυρασίαις πρᾶσιν τῶν ἐνεχύρων εἶναι, τὸ δὲ νόμισμα γίγνεσθαι τῇ πόλει*, Laws, 12, 4. 'If a public duty relating to religion or war is unperformed, the first stage of coercive penalty shall be defeasible by submission of the defaulter, and his goods shall be merely taken in distress by the lawfully appointed official; but if he continue contumacious, the distress shall be sold and the proceeds shall be confiscated.'

§ 28. Raising money for a sacrifice by letting out a beast of burden seems to us to be an exceptional circumstance, but in primitive times it may have been a common practice, originally sanctioned by jus sacrum. (For the importance of distress in early law, before regular courts of law were established, and for instances of its exercise, see Maine's Early History of Institutions, Lect. IX.)

A praediator is defined by Gaius, qui mercatur a populo, above, 2 § 61. A lex praediatoria which might perhaps be passed to enable things thus taken in distress for taxes to be sold, is mentioned by Suetonius: Ad eas rei familiaris angustias decidit, ut cum obligatam aerariis fidem liberare non posset, in vacuum lege praediatoria venalis pependerit sub edicto praefectorum, Claudius 9. 'He was so impoverished, that he could not discharge his obligation to the treasury, and the prefects advertised his goods for sale without reserved price, as provided by lex praediatoria.' On the first day of a sale the amount of the debt due to the state was announced as a reserved price, or minimum for which the goods would be sold. If no bidder appeared on these terms, the goods were offered on a subsequent day without reserve (in vacuum).

§ 30. Sed istae omnes legis actiones paulatim in odium uenerunt. namque ex nimia subtilitate ueterum qui tunc iura condiderunt eo res perducta *est*, ut uel qui minimum errasset, *litem* perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones effectumque est, ut per concepta uerba, id est per formulas litig*e*mus.

§ 30. But all these branches of statute-process fell gradually into great discredit because the excessive subtlety of the ancient jurists made the slightest error fatal; and accordingly they were abolished by the lex Aebutia and the two leges Juliae, which introduced in their stead the system of formulas or written instructions of the praetor to the judex.

§ 31. Tantum ex duabus causis permissum *est* lege agere:

§ 31. Two cases only were reserved for statute-process, appre-

damni infecti et si centumuirale iudicium fu*tu*rum *est*. sane qu*idem* cum ad centumuiros i*tu*r, ante lege agitur sacramento apud praetorem urbanum uel peregrinum [praetorem]. damni uero infecti nemo uult lege agere, sed potius stipulatione qua*e* in edicto proposita est obligat aduersarium suum, *id*que et commodius ius et plenius est. per pignoris *capionem*——| (23 *uersus in C legi nequeunt*) ————apparet.

hended damage and centumviral causes. When there is recourse to the centumvirs, statute-process by way of sacramentum either before the praetor urbanus or peregrinus, as may happen, is the preliminary proceeding. For protection, however, against apprehended damage a plaintiff no longer resorts to statute-process, but stipulates to be indemnified by the defendant in the manner provided by the edict, whereby he is put to less trouble and obtains ampler redress. . . .

§ 32. *Item* in ea forma, quae publicano proponit*ur*, talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnetur.

§ 32. So the formula provided for the farmer of the revenue contains a fiction directing that the debtor be condemned in the sum for which formerly, if his goods had been distrained on, he would have had to ransom the distress.

§ 33. Nulla autem formula ad condictionis fictionem exprimitur. siue enim pecunia*m* siue rem aliquam certam debitam nobis petamus, eam ipsam DARI NOBIS OPORTERE intendimus; nec ullam adiungimus condictionis fictionem. itaque simul intellegimus eas formulas, quibus pecuniam aut rem aliquam nobis dar*i* oportere intendimus, sua ui ac potestate ualere. eiusdem naturae sunt actiones commodati, fiduciae, negotiorum gestorum et aliae innumerabiles.

§ 33. But no formula is moulded on a fictitious legis actio per condictionem; for when we sue for a certain thing or sum of money, our intentio names the very thing or sum for which we sue, without any reference to a fiction of condictio; so that the present formulae by which we claim that a fixed sum of money or that some particular thing is due to us are understood to depend on their own force. Similarly independent of the elder system are the actions of loan for use, fiduciary agreement, unauthorized transaction of another person's affairs, and innumerable others.

§ 34. Habemus adhuc alterius generis fictiones *in* quibusdam formulis, ueluti cum is, qui ex edicto bonorum possessionem petiit, ficto se herede agit. cum enim praetorio iur*e*, non legitimo succedat in locum defuncti, non hab*et* directas actiones, et neque id quod defuncti fuit potest

§ 34. Fictions of a different kind are employed in certain formulae, as for example when the bonorum possessor or praetorian successor sues under a fiction that he is civil heir. For being only the praetorian, not the civil heir, he has no direct action, and can neither claim in the intentio of

intendere SVVM ESSE *neque id quod ei* debebatur potest intendere ⟨*DARI*⟩ SIBI OPORTERE; itaque ficto se herede intendit uelut hoc modo IVDEX ESTO. SI *A.* | AGERIVS (id est si ipse actor) *L. TITIO* HERES *ESSET*, *TVM* ⟨*SI EVM*⟩ FVND*VM* | DE QVO AGITVR EX IVRE QVIRITIVM *EIVS ESSE OPORTERET*; et si— de——, | praeposita simili *fictione heredis* ita subicitur TVM SI *PARE*|RET N. NEGIDIVM ⟨*A.*⟩ A*GERIO* SESTERTIVM X MILIA DARE OPORTERE.

the formula to be [Quiritary] owner of the things belonging to the deceased, nor that the debtor is bound [by civil law] to pay the debts due to him. Accordingly, the intentio feigns him to be civil heir, and runs as follows: 'Let C D be judex. Supposing Aulus Agerius (plaintiff) were the civil heir of Lucius Titius, if in that supposition it be proved that the land in question ought to be his by the law of the Quirites;' or, in case of a debt, after a similar fiction of his being civil heir the intentio proceeds: 'if in that supposition it be proved that Numerius Negidius (defendant) ought [by civil law] to pay to Aulus Agerius ten thousand sesterces: then let the defendant be condemned,' &c.

§ 35. Similiter et bonorum emptor ficto se herede agit; sed interdum et alio modo agere solet. nam ex persona eius cuius bona emerit sumpta intentione conuertit condemnationem in suam personam, id est ut, quod illius esset uel illi dar*i* oporteret, eo nomine aduersarius huic condemnetur; quae species actionis appellatu*r* Rutiliana, quia a praetore P. Rutilio, qui et bonorum uenditionem introduxisse dicitur, conparata es*t*. superior autem species actionis, qua ficto se herede bonorum emptor *agit*, Seruiana ⟨*uocatur*.

§ 35. So the purchaser of a bankrupt's estate may either feign himself to be civil heir, or may use a different form [feigning to be procurator of the insolvent]: for he may name the insolvent in the intentio and himself in the condemnatio, requiring the defendant to restore or pay to himself any property that belonged or any debt that was due to the insolvent. This form of action is called Rutilian, from the praetor Rutilius, who invented execution against the entire estate of the insolvent (bonorum venditio): the action wherein the plaintiff feigns himself civil heir is called Serviana.

§ 36. *Item usucapio fingitur in ea actione quae Publiciana*⟩ uocatur. datur autem haec actio ei qui ex iusta causa traditam sibi rem nondum usucepit eamque *a*miss*a* possession*e* petit. nam quia non potest eam EX IVRE QVIRITIVM SVAM ESSE intendere, fingitur rem usuce-

§ 36. So there is a fiction of usucapion in the Publician action, whereby a man claims a thing which had been delivered to him on a valid legal ground which he has lost possession of before having acquired ownership of it by usucapion. Being unable to claim it in the intentio as his property

pisse et ita quasi ex iure Quiritium dominus factus esset intendit, ueluti hoc modo IVDEX ESTO. SI QVEM HOMINEM A. AGERIVS EMIT ⟨ET⟩ IS EI TRADITVS EST, ANNO POSSEDISSET, TVM SI EVM HOMINEM DE QVO AGITVR EX IVRE QVIRITIVM EIVS ESSE OPORTERET et reliqua.

by the law of the Quirites, he is feigned to have acquired it by usucapion, and thus to have become owner by quiritary right, and his intentio runs as follows: 'Let C D be judex. Supposing that the slave who was sold and delivered to Aulus Agerius had continued during a year in his possession, if in that case the slave would have legally belonged to Aulus Agerius by the law of the Quirites, then condemn the defendant,' &c.

§ 37. Item ciuitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi: ueluti si furti agat peregrinus aut cum eo ⟨*agatur.. nam si cum peregrino*⟩ *agatur*, *f*ormula ita concipitur IVDEX ESTO. SI PARET ⟨*L. TITIO OPE*⟩ CONSILIOVE DIONIS HERMAEI FILII FVRTVM FACTVM ESSE PATERAE AVREAE, QVAM OB REM EVM, SI CIVIS ROMANVS ESSET, PRO FVRE DAMNVM DECIDERE OPORTERET et reliqua. item si peregrinus furti agat, ciuitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriae agat aut cum eo agat*ur*, ficta ciuitate Romana iudi*ci*um datur.

§ 37. So an alien is feigned to be a Roman citizen, if he sue or be sued in an action which would be valid as between Roman citizens, and it is an action which may justly be extended to aliens. For instance, if an alien sues or is sued for theft, in the latter case the formula runs as follows: 'Let C D be judex. If it be proved that Dio son of Hermaeus stole—or, if it be proved that Dio son of Hermaeus aided and abetted in stealing—from Lucius Titius a golden cup, for which, if he had been a Roman citizen, he would have had to make composition for theft, then condemn Dio son of Hermaeus,' &c. So if an alien sue for theft or sue or be sued under the Aquilian law for damage to property, he is feigned to be a Roman citizen.

§ 38. Praeterea aliquando fingimus ad*uers*arium nostrum capite deminutum non esse. nam si ex contractu nobis obligatus obligataue sit et capite deminutus deminutaue fuer*i*t, uelut mulier per coemptionem, masculus per adrogationem, desinit iure ciuili debere nobis, nec directo intendi potest sibi dare

§ 38. Again, we may feign that the defendant has not undergone a capitis deminutio: for if we make a contract with a person who afterwards undergoes a capitis deminutio, as an (independent) female by her coemption, or an independent male by his adrogation, he or she ceases by the civil law to be our debtor, and

eum eamue oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamue actio utilis rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutaue non esse.

we cannot directly declare in the intentio that he or she is bound to convey something to us. To protect our rights, however, from extinction by the act of another, the praetor grants a fictitious action, rescinding or ignoring the defendant's capitis deminutio, i.e. supposing by a fiction that the debtor had not undergone it.

§ 30. The lex Aebutia, of uncertain date, was probably passed not long after the middle of the second century B.C. The leges Juliae are supposed to be leges judiciariae passed by Augustus. What were the respective shares of these different enactments in bringing about the important change of procedure Gaius mentions must remain uncertain. After the legis actiones were abolished as modes of proceeding in civil suits their forms still survived in the ceremonies of adoption, the manumission of a slave, the emancipation of a son, and conveyance by in jure cessio.

It may be questioned whether Gaius has exactly laid his finger on the deficiency of the system of Statute-process when he alleges its excessive formalism or subtlety (nimia subtilitas) as the cause of its failure. Its shortcoming was not so much its formalism (the following system was equally formalistic) as (1) its want of safeguards against errors of form and (2) its want of power of expansion.

(1) Though the Formula was perhaps as literally and rigorously interpreted as the form of Statute-process, yet the period at which the Formula was fixed in the Formulary system diminished the danger of the defeat of a righful claim by an error in the selection of the appropriate form. The formula of an action was not determined till the close of a debate before the magistrate (in jure) in which both parties were assisted by jurists and had disclosed, in part at least, their pretensions, and brought the true issue to light. Statute-process was formal at an earlier stage and from the inception of the proceedings: and the kinds of statute-process were specially characterized and denominated by their first stages even when these were extra-judicial or outside the court, as in manus injectio and pignoris capio. In Statute-process an error of form at any of the stages preceding litis contestatio was fatal to the party by whom it was committed. In the Formulary system no litigant could commit a suicidal error—no form was fixed whereby his claim could be defeated—before the litis contestatio.

(2) A plaintiff had no remedy unless he could show that his case had been contemplated by the legislator: but the legislator had been too much occupied with foreign war and domestic dissension to think

of developing the private code. Jurisprudence had been busy in framing such actions as the system admitted ; but jurisprudence had little voice and little scope. If the law was silent, if there was any hiatus or casus omissus, jurisprudence was not allowed to fill up the void. The praetor himself had his hands tied and was a mere piece of machinery. The institution of the Formulary process gave an organ to the voice of jurisprudence, and the power of issuing edicts and inventing new forms of action constituted the praetor, in fact though not in name, a second legislator. The enlarged scope given to the conscience of jurisprudence by the new powers of the praetor produced an enlargement of the scheme of remedies such as followed in England from the recognition of the royal conscience as a source of civil legislation and the erection, beside and in addition to the common law courts, of a court of Chancery presided over by the guardian of the conscience of the king. Ihering, § 47 ; cf. Sohm, § 49.

Conceptae feriae denoted holidays specially appointed by the magistrate, as opposed to feriae stativae : so concepta verba seems to denote the formulae accommodated by the magistrate to the various grounds of litigation, as opposed to the certa verba, § 29, or more immutable formulae prescribed to the litigants in Statute-process by the legislator. The term, then, expresses elasticity. Cf. Roby, 2, p. 347, n. 2.

We may observe by anticipation that the Formulary system, after an existence of nearly five hundred years, was brought by the ingenuity of lawyers into the same discredit and experienced the same fate as the system it had displaced. First Diocletian, A. D. 294, required provincial governors as a rule to hear and determine all causes themselves, instead of commissioning official judices to hear and determine them, Cod. 3, 3, 2 ; cf. Cod. 3, 3, 5. 'Governors of provinces shall themselves determine the causes which they have been in the habit of referring to inferior (pedaneos) judges, unless prevented from doing so by pressure of business or the excessive number of causes.' Pedaneus judex signifies in this passage not the ordinary judex of the Formulary system, who acted with an independent authority, but a subordinate official to whom the governor delegated his extraordinaria cognitio for trying cases. From the time of Diocletian it was the ordinary practice that the magistrate should not send the case to a private judex to be tried under a formula, but should judge in person by virtue of his extraordinary authority, though under certain circumstances he could, as we see by the above passage, appoint an official called judex pedaneus as his substitute. Thus cognitio extraordinaria, which in earlier times was only employed occasionally in exceptional cases, had become the rule. Afterwards the emperors Constantius and Constans, A. D. 342, en-

tirely abolished formulae. Juris formulae, aucupatione syllabarum insidiantes, cunctorum actibus radicitus amputentur, Cod. 2, 57, 1. 'Legal formulae, with their syllabic snares and pitfalls, are hereby abolished in every procedure.'

§ 31. The proceeding under the edict in Damni infecti was as follows: If A apprehended damage to his property from the downfall of a dilapidated house (aedes vitiosae, ruinosae) belonging to B, he might apply (postulare) to the praetor and, having affirmed his case on oath, obtain an order that B should promise, with or without sureties according to circumstances, to indemnify A in the event of the accident. If B refused to promise, the praetor by a first decree put A in possession, that is, gave him detention or custody of B's house. If B still refused, the praetor by a second decree gave A bonitary ownership, which time would convert by usucapion into quiritary ownership. This remedy, imposing the necessity of indemnifying or surrendering the cause of damage, was an imitation of noxal actions, which compelled the father of a son or owner of a slave or of a beast that had injured a neighbour's property either to make compensation or to surrender the author of the damage. (For a detailed account of this proceeding, see Roby, Bk. 4, ch. 8.)

The proceeding damni infecti nomine by statute-process, from its similarity to the proceeding in aquae pluviae arcendae, may be inferred to have been a form of judicis postulatio.

§ 32. In English law there is a similar reference to an obsolete institution in the case of debtors to the sovereign. By 33 Hen. 8, c. 39, and 13 Eliz. c. 4, persons indebted to the Crown are to incur in certain cases the same liability as if they were bound in a Statute Staple, a form of solemn contract now disused.

§§ 33, 34. Gaius appears to have divided Fictions into two classes, those which made a reference from the formulary system to the older system of procedure, and those which made a reference from rights protected by the praetor to rights recognized by the civil law. The former class were not an extension of the law, but only preserved to a plaintiff the remedies which he otherwise would have lost by the change of procedure when statute-process was abolished. For instance, the fiction of Pignoris capio was employed to preserve unimpaired the rights of the revenue contractor and as a measure for assessing the damages to which he was entitled against a defaulter. We see by the statement made in § 33 about condictio, that a fiction was not required in all cases for the purpose of transferring an action from the old procedure to the new. But no information has come down to us as to the precise way in which this class of fiction was employed. Cf. Keller, § 18 n., 247 a, and § 25 n., 298.

The second class of fictions was an extension or reform of the law.

protecting persons whose rights had previously not been recognized, or mitigating the rigours and liberalizing the narrow-mindedness of the ancient barbarous legislation: granting to the bonitary owner by inheritance or purchase the protection enjoyed by the quiritary owner; giving to the alien the redress provided for the citizen, and preserving to the creditor the remedies extinguished by the debtor's diminution of status. In their task of ameliorating the law the praetors proceeded as unobtrusively as possible, by tacit rather than by open legislation, and rather by innovations in the adjective code, to use Bentham's expression, or code of procedure, than in the substantive code. The introduction of the formulary system, giving them authority to create new actions, had virtually invested them with much legislative power. The new actions introduced by the praetor were called actiones utiles. Utiles actiones were either ficticiae or in factum, or constituted by a change of parties in the intentio and condemnatio of the formula, e.g. actiones adjecticiae qualitatis, §§ 69-74 *a*; cf. 3 § 219, comm. Let us examine these three different forms of praetorian action in respect of the mode of their operation. The praetor proceeded in two ways, (1) with or (2) without the use of fiction.

(1) When he granted a fictitious action, that is, one whose formula was framed in exactly the same way as that of a civil action, except that a fictio was added to it, the fiction furnished an exact measure of the extent to which the old law had been abandoned. The praetor might in this way suppress some element of the title to which the remedy at civil law was annexed; and make the same consequences follow as if this element had existed. The fiction would be the false assumption that the plaintiff's case satisfied the abrogated condition. By ruling that the fictitious proposition should not be called in question, and that the defendant should not be allowed to demur to the plaintiff's claim on the ground that the conditions required for maintaining it were unsatisfied, the praetor would virtually abrogate the old law, and substitute for it a new one. In the cases given by Gaius the conditions which are assumed relate to inheritance, usucapion, citizenship, capitis deminutio. They might conceivably relate to any other institution of civil law. In the Actio Pauliana protecting creditors against fraudulent alienations, the fiction was an assumption of non-delivery—the formula being something like this: Si quem hominem L. Titius in hoc anno fraudationis causa Numerio Negidio, qui eam fraudem non ignoravit, mancipio dedit, L. Titius Numerio Negidio mancipio non dedisset, tum si pareret eum hominem de quo agitur ex jure Quiritium L. Titii esse, si ea res arbitrio tuo non restituetur, &c., Lenel, p. 353. Restitutio in integrum of a minor might assume the form of a

fictitious action which treated the rescinded act as unperformed (rescissa alienatione).

(2) A utilis actio, e.g. the formula Rutiliana, § 35, sometimes depended on a variance in the parts of a formula, the true plaintiff or defendant first appearing in the condemnatio after another person had been named in the intentio. The formula is thus shaped when one of the parties to an action is a procurator, §§ 86, 87; but the later utilis actio on account of the cession or assignment of an obligation, when there was no mandatum agendi, may perhaps be fictitious. The actiones adjecticiae qualitatis were also instituted by means of this kind of variance in the parts of the formula.

(3) Without expressly referring in any way to jus civile, or avowedly introducing a new principle of substantive law, he created new rights by directing that the defendant should be condemned if the judex found that the facts asserted by the plaintiff in the intentio were made out. He did so in granting an actio in factum, one of his most potent instruments, that is, an actio whose intentio in factum concepta, of the form, Si paret . . . fecisse, factum esse, e.g. actio doli—Si paret doli mali Numerii Negidii factum esse, ut Aulus Agerius Numerio Negidio fundum de quo agitur mancipio daret, &c., or actio quasi-Serviana—Si paret inter Aulum Agerium et L. Titium convenisse, ut ea res, de qua agitur Aulo Agerio pignori hypothecaeve esset propter pecuniam debitam, &c.; for thus he tacitly introduced or converted a rule of equity or public opinion into a principle of substantive law, without any fiction or reference to previous rules. Utilis actio in factum, Dig. 11, 7, 7, 1, was an action that really had an affinity or analogy to some actio directa, but did not in its formula accentuate this affinity by means of any Fictio, e.g. actio Depositi, § 47.

Of the above forms of actio utilis the actio ficticia was probably the first to be established, and the actio in factum concepta the most recent.

§ 35. The purchaser of a bankrupt's estate (bonorum emptor), unlike the purchaser at a sectio bonorum, or sale sub hasta of the confiscated goods of an enemy or a criminal, only had a title to the property under the praetor's edict and not by civil law. Hence to protect his rights the praetor allowed him to sue by actio ficticia either by resort to the fiction that he was heres, or by a variance of the parts of the formula (convertit condemnationem in suam personam), and he was liable to corresponding actions. Cf. 3, §§ 77-81, comm.

The praetor Publius Rutilius is probably the P. Rutilius who was consul in 105 B.C. The formula which he introduced for the

bonorum emptor was the same as that used in other cases where one person sued or was sued in the name of another, § 86.

The actio Serviana here mentioned was perhaps the action brought by the bonorum emptor when he had bought the estate of a deceased debtor and so was not the same action as the actio Serviana whereby a person letting his land on hire could recover the goods of a colonus which had been pledged as a security for the payment of rent, Inst. 4, 6, 7.

§ 36. The date of the important praetorian action called actio Publiciana, after the praetor who introduced it (Inst. 4, 6, 4), is uncertain. A Quintus Publicius is mentioned by Cicero, pro Cluentio, 45, as praetor in B. C. 66 or shortly before. The actio Publiciana (vindicatio utilis) was, as we have seen, 2 §§ 40–61, comm., used by a person holding the position of an owner whether as bona fide possessor or as having a bonitary title for the purpose of obtaining or recovering possession. But the action might also be available on account of its convenience to an owner ex jure Quiritium who wished to be relieved of the necessity of proving his title. The plaintiff had to prove that he acquired possession in consequence of some disposition (titulus, causa) such as emptio. His acquisition had to be accompanied like Usucapio by bona fides, i. e. a belief that the alienor had a power to aliene; but as the proof of bona fides is impossible, whereas the proof of mala fides is often easy, bona fides was presumed; i. e. the burden of the proof of mala fides was thrown on the defendant. If the plaintiff proved his intentio the defendant would still prevail if he could show that he was himself owner (exceptio dominii), or that he had obtained usucapion possession from some third party (a diverso auctore), or that having obtained usucapion possession from the same person as the plaintiff had acquired from (ab eodem auctore), his acquisition was prior in point of time. In these cases Publiciana wore the air of a duplex judicium. Savigny, Obligationsrecht, § 67. For an account of the actio Publiciana, when maintained by (1) a bonitary owner, (2) a bona fide possessor, see 2 §§ 40–61, comm.

The form of the actio Publiciana that we have considered proceeds on the supposition of the accomplishment of a non-accomplished usucapio. Some writers, misled by Dig. 44, 7, 35, pr., have imagined the existence of another form of Publiciana, which they call contraria Publiciana or Publiciana rescissoria, proceeding on the supposition that an accomplished usucapio had not been accomplished. But Savigny has shown, § 329, that this is erroneous: that when usucapion is rescinded by in integrum restitutio on account of Absence, the action whereby the plaintiff recovers his property may be, according to circumstances, either an ordinary Publiciana

or an ordinary Vindicatio, Inst. 4, 6, 5: that the rescission of usucapio, in other words, does not give birth, as supposed, to any new form of action.

§ 38. By a positive rule, of which we are unable to give the rationale [1 §§ 159–164, comm.], the change of status produced by coemptio and adrogatio extinguished the debts of the wife or adrogatus, and the husband or adrogator acquired by manus and patria potestas their rights without their liabilities. To meet this the praetor gave the creditor an actio rescissoria which was ficticia: Ait praetor: qui quaeve, posteaquam quid cum his actum contractumve sit, capite deminuti deminutaeve esse dicentur, in eos easve quasi id factum non sit judicium dabo, Dig. 4, 5, 2. If the action was not defended by the husband or adrogator, the praetor gave the creditor missio in possessionem and power of sale against all the property of the wife or adrogatus, 3 § 84.

§ 39. Partes autem formularum hae sunt: demonstratio intentio adiudicatio condemnatio.

§ 40. Demonstratio | est ea pars formulae quae—, ut demon|stretur res de qua agitur: uelut haec pars formulae QVOD A. AGERIVS N. NEGIDIO HOMINEM VENDIDIT; item haec QVOD A. AGERIVS ⟨*APVD*⟩ N. NEGIDIVM HOMINEM DEPOSVIT.

§ 41. Intentio est ea pars formulae, qua actor desiderium suum concludit: uelut haec pars formulae SI PARET N. NEGIDIVM A. AGERIO SESTERTIVM X MILIA DARE OPORTERE; item haec QVIDQVID PARET N. NEGIDIVM A. AGERIO DARE FACERE ⟨*OPORTERE*⟩; item haec SI PARET HOMIN*EM* EX IVRE QVIRITIVM A. AGERII ESSE.

§ 42. Adiudicatio est ea pars formulae, qua permittitur iudici rem alicui ex litigatoribus adiudicare: uelut si inter co-

§ 39. The formula is composed of the Demonstratio, the Intentio, the Adjudicatio, the Condemnatio.

§ 40. The principal function of the part of the formula called Demonstratio is to indicate the subject-matter of dispute, [the cause of action, the title of the plaintiff's right, the origin of his claim], as in the following example: 'Whereas Aulus Agerius sold a slave to Numerius Negidius,' or, 'Whereas Aulus Agerius deposited a slave in the hands of Numerius Negidius.'

§ 41. The Intentio is that part of the formula which expresses the claim of the plaintiff, thus: 'If it be proved that Numerius Negidius ought to convey ten thousand sesterces to Aulus Agerius;' or thus: 'Whatever it be proved that Numerius Negidius ought to convey or render to Aulus Agerius;' or thus: 'If it be proved that the slave in question belongs to Aulus Agerius by the law of the Quirites.'

§ 42. The Adjudicatio is that part of the formula which empowers the judex to transfer the ownership of a thing to one of

heredes familiae erciscundae agatur, aut inter socios communi diuidundo, aut inter uicinos finium regundorum. nam illic ita est QVANTVM ADIVDICARI OPORTET, IVDEX TITIO ADIVDICATO.

the litigants, and occurs in the actions for partitioning an inheritance between co-heirs, for dividing common property between co-partners, and for determining boundaries between neighbouring landholders. In these the praetor says: 'The portion of the property that ought to be transferred to Titius, do thou, judex, by thy award transfer to him.'

§ 43. Condemnatio est ea pars formulae, qua iudici condemnandi absoluendiue potestas *per*mittitur: uelut haec pars formulae IVDEX N. NEGIDIVM A. AGERIO SESTERTIVM X MILIA CONDEMNA. SI NON PARET, ABSOLVE; item haec IVDEX N. NEGIDIVM A. AGERIO DVMTAXAT ⟨X *MILIA*⟩ CONDEMNA. SI NON PARET, ABSOLVITO; item haec IVDEX N. NEGIDIVM A. AGERIO CONDEMNATO et reliqua, ut non adiciatur DVMTAXAT ⟨X *MILIA*⟩.

§ 43. The Condemnatio is that part of the formula which empowers the judex to condemn or absolve the defendant, thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius ten thousand sesterces; if it be not proved, declare him to be absolved;' or thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding ten thousand sesterces; if the case be not proved, declare him to be absolved;' or thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius,' et cetera, without inserting any maximum limit as, e. g., of not more than ten thousand sesterces.

§ 44. Non tamen istae omnes partes simul inueniuntur, sed quaedam inueniuntur, quaedam non inueniun*tur*. certe intentio aliquando sola inueni*tur*, sicut in praeiudicialibus formulis, qualis est qua quaeritur, aliquis libertus sit uel quanta dos sit et aliae co*n*plures. demonstratio autem et adiudicatio et condemnatio nu*m*quam solae inueniuntur. nihil enim omnino ⟨*demonstratio*⟩ sine intentione uel condemnatione ualet; item condemnatio sine demonstratione uel intentione, uel adiudica⟨*tio sine demonstratione uel inten*⟩tione nullas uires habet, ⟨*et*⟩ ob id numquam solae inueniuntur.

§ 44. These parts are not concurrent, but where some are present others are absent. Sometimes the Intentio is found alone, as in the prejudicial formula to decide whether a man is a freedman, or to ascertain the amount of a dower, or to settle other preliminary inquiries. But the Demonstratio, Adjudicatio, and Condemnatio are never found alone, for the Demonstratio is inoperative without an Intentio and Condemnatio, and the Condemnatio and Adjudicatio are inoperative without a Demonstratio or an Intentio.

§ 39. Besides the four parts mentioned by Gaius the formula always contained a nomination of a judex, and sometimes an exceptio, praescriptio, or arbitrium, accessory parts which will be presently explained.

§ 40. The demonstratio seems not to have occurred in real actions nor in personal actions in factum, but in personal actions in jus, whether founded on contract or on delict, where the intentio was incerta res—quidquid paret dare facere oportere—but not where the intentio was certa, as in the condictio certi. It was introduced in order to form a basis for aestimatio, whenever an intentio incerta left the quantum of the condemnatio to be determined by the judex. In actio in rem Publiciana, § 36, and Condictio certi, § 55, the causa is introduced, not in Demonstratio, but as a part of the Intentio.

If the contract had a technical name (e.g. depositum, venditio) the demonstratio contained the name (deposuit, vendidit); if the contract was nameless, it was described in the praescriptio, which was a substitute for the demonstratio, by a circumlocution, and this kind of process was called agere or at a later time actio praescriptis verbis, 3 §§ 90, 91, comm. That a demonstratio was found in actions ex maleficio appears from Gaius, below, § 60, and from Paulus, as quoted in Collatio, 2, 6. Sicut formula posita est: *Quod Aulo Agerio a Numerio Negidio pugno mala percussa est:* Illud non cogitur dicere, dextra an sinistra, nec qua manu percussa sit. Item si dicat infamatum se esse, debet adjicere quemadmodum infamatus sit. Sic enim et formula concepta est: *Quod Numerius Negidius sibilum inmisit Aulo Agerio infamandi causa.* 'As the formula is worded: Whereas Aulus Agerius was struck on the cheek by the fist: the plaintiff is not compelled to declare whether he was struck on the right or left cheek, or whether with the right or left hand. And if he sue for defamation, he must allege the means, for so the formula is framed: Whereas Numerius Negidius hissed Aulus Agerius with the purpose of defamation.'

The absence of a demonstratio in the formula of condictio certi may be inferred from the example given by Gaius, § 86, and from the assertion of Cicero, pro Roscio Comoedo, 4, that it did not appear whether Fannius, who sued Roscius by condictio certi, founded his claim on mutui datio, expensilatio, or stipulatio. He could hardly have asserted this, if the title on which Fannius sued had been expressed in a demonstratio. On the other hand, we have a praescriptio corresponding to a demonstratio in the actio ex stipulatu for an uncertain amount, §§ 136, 137. It is obvious that if a man sues for an indeterminate sum of money he ought to give the defendant some further information of the cause of action; but

if he sues for a determinate sum or a definite thing, the defendant can scarcely be ignorant of the cause of action on which the plaintiff relies.

§ 42. The adjudicatio was only found in the three actions familiae erciscundae, communi dividundo, and finium regundorum. It was not a declaration of existing rights of property, but a partition of property by a judex between the litigants. Adjudicatione dominium nanciscimur . . . nam si judex uni ex heredibus aut sociis aut vicinis rem aliquam adjudicaverit, statim illi adquiritur sive mancipi sive nec mancipi sit, Ulpian, 19, 16. 'Adjudication is a means of acquiring dominion, for the heir, partner, or neighbouring landowner, to whom a thing is adjudicated by the judex, forthwith acquires ownership therein, whether it is mancipable or not mancipable.' In quibus tribus judiciis permittitur judici, rem alicui ex litigatoribus ex bono et aequo adjudicare, et, si unius pars praegravare videbitur, eum invicem certa pecunia alteri condemnare, Inst. 4, 6, 20. 'In these three actions the judge has the power to assign a thing in accordance with fair-dealing and equity to one of the litigants, and, if this one obtains more than his share, to condemn him to make pecuniary compensation to the other.'

§ 43. Taxatio [signified by the word 'dumtaxat'] was a limitation to the condemnatio, §§ 51, 52; cf. 3 § 224. Besides the kind noticed here by Gaius, there were several others. If a paterfamilias was sued for the debt of a person in his power whom he had authorized to trade, the condemnation was limited to the amount of the peculium (quatenus in peculio sit); if the slave or son had traded without authority, it was limited to the amount of profit the father or master had thereby received (quatenus in rem ejus versum sit), §§ 72, 73; if the heir of a wrongdoer was sued, it was limited to the amount that he gained from the wrong or fraud by his succession (dumtaxat in id quod ad eum pervenit quanto locupletior factus est).

Again, in an analogous way, some debtors enjoyed a privilege that is called Beneficium competentiae: the privilege of not being condemned to pay the whole amount of their debt but only such an amount as will leave them the means of subsistence (condemnatio in tantum quantum facere potest. Cf. Inst. 4, 6, 37, 38). A soldier sued by any creditors; a debtor who has made cessio bonorum, sued by his original creditors in respect of after-acquired property, Inst. 4, 6, 40; cf. 3 §§ 77–81, comm.; a person sued on becoming a paterfamilias, but without inheriting much property, by a creditor in an obligation other than a delictal one, incurred when he was a filiusfamilias, Dig. 14, 5, 2–7; an ascendant sued by a descendant, Inst. 4, 6, 38; a husband sued by a wife or a wife by a husband

before or after divorce for a debt incurred during marriage; a father-in-law sued by a son-in-law for a promised dower; a donor sued by a donee; a partner sued by a partner, Inst. 4, 6, 38; were only liable to be condemned in such a sum as would leave them the necessaries of life. The privilege was enforced by Exceptio, Dig, 44, 1, 22. It was forfeited by dolus and did not apply to liabilities arising from delict. If such a privileged debtor was condemned in the whole amount of his fortune he could claim to have a deduction for his means of subsistence made in the levy of execution.

The obligation of the privileged debtor, however, was not extinguished until his creditor had received full satisfaction, and any after-acquired property of the debtor was liable to the claims of the creditor. Accordingly, at the period when Res judicata operated either ipso jure or ope exceptionis to extinguish all rights of action arising from the same ground, 3 § 180, it was necessary, in order to preserve the creditor's right of subsequent action for the residue, that the judge, as a condition of allowing the Beneficium competentiae, should compel the debtor to enter into a stipulation on which a subsequent suit could be grounded. At a later period, when Res judicata had lost its power of necessary Novation, it was no longer requisite to exact this cautio from the debtor before he was allowed to enjoy the Beneficium competentiae. Vangerow, § 174.

§ 44. A praejudicium is mentioned, 3 § 123, to try whether a creditor had openly declared to the sureties the amount of the debt and number of sureties; on which facts would depend the several liabilities of each surety.

When Manus had fallen into desuetude, Dos, the contribution by or on behalf of the wife to the expenses of matrimony, became during the subsistence of the marriage tie the property of the husband, 2 § 63, but might have to be restored at its termination. The law, however, by a partial EXTINCTION of the dower, allowed him to retain whatever necessary outlay he had made for its maintenance: Impensae necessariae dotem ipso jure minuunt, Dig. 23, 2, 61. Cf. § 102, comm. If, now, we assume with Ihering that there was a period when every action was required to have an intentio certa, § 50, we can understand the necessity of a praejudicium to ascertain quanta dos sit. For when the divorced wife sued for restitution of her dower, having no means of knowing the amount of her husband's outlay upon it or what portion of his outlay was necessary to its maintenance, she would certainly have incurred the penalties of plus petitio, § 53, if she was not allowed to ascertain by a preliminary issue the amount of the dower after deduction of the necessary outlay. See §§ 115, 137, comm.

So when by the lex Falcidia all legacies were proportionally abated until a fourth remained to the heir, it was necessary, in order to enable the legatee to avoid plus petitio, to allow him to ascertain the amount of the inheritance by a preliminary inquiry: Cum dicitur lex Falcidia locum habere, arbiter dari solet ad ineundam quantitatem bonorum, Dig. 35, 3, 1, 6. 'When Falcidia is alleged to be applicable, an arbiter is appointed to ascertain the amount of the inheritance.'

Could a formula consist solely of a Demonstratio and a Condemnatio? Yes, if Savigny is right in supposing, § 312, that the Praetor sometimes granted a formula of the following shape:

Quod Aulus Agerius juravit, Numerium Negidium fundum Cornelianum ipsi dare oportere, quanti is fundus est, eum condemna. 'Whereas the plaintiff has sworn that the defendant owes him such and such a thing, do thou, judex, condemn the defendant to pay him its value.'

To explain this we must notice a peculiar use of the oath (jusjurandum) in Roman litigation.

The Teutonic tribes, including our ancestors, allowed a defendant to purge himself by his own oath supported by the oath of a certain number of his neighbours; of which institution we have a vestige in the Wager of law, which was recently an incident of the action of Detinue, in which the defendant might clear himself by his own oath and that of eleven compurgators. With such principles of evidence it is not surprising that in the German forests the struggle between litigants was not, who should escape the burden of proof but, who should enjoy the privilege of proof. The Roman method was not so liable to abuse. Either litigant might tender (deferre, delatio) an oath to his adversary, i.e. offer to be concluded by his adversary's oath, on an issue either of fact or of law (as to the existence of obligation, ownership, succession, &c.). The oath was then equivalent to a judgment in favour of the person by whom it was sworn, Inst. 4, 13, 4. If a litigant was prepared to take an oath his adversary might release him from actually swearing (dare, praestare jusjurandum); but this release (remittere, remissio) was equivalent to an actual oath. Instead of taking a tendered oath, the adversary might make a counter-tender (referre, relatio), i.e. submit the issue to the oath of the original tenderer. To decline either to swear or to make a counter-tender was equivalent to a confession of the party who declined, or to an oath of the party who tendered. From this necessity imposed on the party to whom it was tendered, the oath was called jusjurandum necessarium, Dig. 12, 2, 34, 6. If now on a tender or counter-tender by a defendant a plaintiff swore to the justice of his claim, the assessment of damages (rei aestimatio)

would still remain as a question for the judex, and the praetor might, according to Savigny, give him a formula consisting, as above, of a Demonstratio and a Condemnatio. (But see Lenel, § 54.)

Similarly in case of a Confessio in jure, where anything but pecunia certa was admitted to be due, a litis aestimatio would be necessary, of which the formula as constructed by Savigny would be: Quod Numerius Negidius in jure confessus est, fundum illum Aulo Agerio se dare oportere, Quanti is fundus est, judex, Numerium Negidium Aulo Agerio condemna: si non paret absolva. Savigny, § 303; Keller, § 63.

§ 45. Sed eas quid*em* formulas, in quibus de iure quaeritur, in ius conceptas uocamus, quales sunt, quibus intendimus NOSTRVM ESSE ALIQVID EX IVRE QVIRITIVM au*t* NOBIS DARI OPORTERE aut PRO FVRE DAMNVM ⟨*DECIDI OPORTERE*; *sunt et aliae, in*⟩ quibus iuris ciuilis intentio est.

§ 46. Ceteras uero in factum conceptas uocamus, id est in quibus nulla talis inten*tio* concepta est, ⟨*sed*⟩ initio formulae nominato eo quod factum est adi*ciuntur* ea uerba, per quae iudici damnandi absoluendiue potestas datur: qualis est formula, qua utitur patron*us* contra libertum, qui eum contra edictum praetoris in ius *u*ocauit; nam in ea ita est RECVPERATORES SVNT*O*. SI PARET ILLVM PATRONVM AB ILL*O* LIBERTO CONTRA EDICTVM ILLIVS PRAETORIS IN IVS VOCATVM ESSE, RECVPERATORES ILLVM LIBERTVM ILLI PATRONO SESTERTIVM X MILIA CONDEMNATE. SI NON PARET, ABSOLVIT*E*. ceterae quoque formulae, quae sub titulo DE IN IVS VOCANDO propositae sunt, in factum conceptae sunt, uelut aduersus eum, qui in ius uocatus neque uenerit neque

§ 45. Those formulae are said to be framed in jus, which raise a question of right; when, for instance, we claim in the intentio of the formula that the thing is ours by the law of the Quirites, or claim in it that the defendant is bound to convey something to us or to make composition to us as a thief; for in such formulae the intentio is one of civil law.

§ 46. But other formulae, on the contrary, are said to be in factum when they are not drawn up with an intentio of the above kind; but, after proposing a question of fact in the intentio, proceed at once to the Condemnatio and Absolutio; as in a formula used by a patron when suing his freedman for summoning him before the magistrate in contravention of the edict. The formula then runs thus: 'Let M N be recuperators. If it be proved that such and such a patron was summoned to appear by such and such a freedman against the edict of such and such a praetor, do you, recuperators, condemn the said freedman to pay to the said patron ten thousand sesterces; if it be not proved, declare him to be absolved.' The other formulae, which are set out in the title of the edict about summoning before

uindicem dederit; item contra eum, qui ui exemerit eum qui in ius uocatur; et denique innumerabiles eius modi aliae formulae in albo proponuntur.

the magistrate, raise questions of fact, as the formula in an action against a defendant who on service of summons neither appears nor finds a vindex, or against a person who makes a violent rescue of a person summoned to appear; and many other formulae of this kind are set out in the praetor's album.

§ 47. Sed ex quibusdam causis praetor et in ius et in factum conceptas formulas proponit, uel*u*ti depositi et commodati. illa enim formula, quae ita concepta est IVDEX ESTO. QVOD A. AGERIVS APVD N. NEGIDIVM MENSAM ARGENTEAM DEPOSV*IT*, QVA DE RE *AGITVR*, QVIDQVID OB EAM REM N. NEGIDIVM A. AGERIO DARE FACERE OPORTET EX FIDE BONA, EIVS *IV*DEX N. NEGIDIVM A. AGERIO CONDEMNATO, *NISI* R*ESTITVAT*. SI NON PARET, ABSOLV*ITO*, in ius concepta est. at illa formula, quae ita concepta est IVDEX ESTO. SI PARET A. AGERIVM APVD N. NEGIDIVM MENSAM ARGENTEAM DEPOSVISSE EAMQVE DOLO MALO N. NEGIDII A. AGERIO REDDITA*M* NON ESSE, QVANTI EA RES ERIT, TANTAM PECVNIAM IVDEX N. NEGIDIVM A. AGERIO CONDEMNATO. SI NON PARET, ABSOLV*ITO*, in factum concepta est. similes etiam commodati formulae sunt.

§ 47. But some actions may be instituted by formulae either of law or of fact, as for instance the actions of Deposit and Loan for use. Thus the following formula is one of law: 'Let C D be judex. Whereas Aulus Agerius deposited a silver table with Numerius Negidius, which is the ground of action, whatsoever it be proved that Numerius Negidius is on that account bound by good faith to convey or render to Aulus Agerius, do thou, judex, condemn Numerius Negidius to pay its value, unless he make restitution; if it be not proved, declare him to be absolved.' Whereas a formula thus framed: 'Let C D be judex. If it be proved that Aulus Agerius deposited a silver table in the hands of Numerius Negidius, and that by the fraud of Numerius Negidius it has not been restored to Aulus Agerius, do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value of the table; if it be not proved, declare him to be absolved:' is a formula of fact. And there is a similar alternative in the case of Loan for use.

§ 48. Omnium autem formularum, quae condemnationem habent, ad pecuniariam aestimationem condemnati*o* concepta est. itaque et si corpus aliquod petamu*s*, ueluti fundum hominem uestem ⟨*aurum*⟩ ar-

§ 48. Whenever a formula contains a condemnation clause, such clause is so framed as to express value in money. So even when we claim a corporeal thing, like land, a slave, a garment, gold or silver, the judex condemns the

*g*entum, iudex non ipsam rem condemnat *e*um cum quo actum est, sicut olim fieri solebat, ⟨*sed*⟩ aestimata re pecuniam eum condemnat.

defendant to deliver not the thing itself, as in the older system of procedure, but its value in money.

§ 49. Condemnatio autem uel certae pecuniae in formula proponitur uel incertae.

§ 49. The formula either sets out a certain sum in the Condemnatio or is for an uncertain sum.

§ 50. Certae pecuniae uelut in ea formula, qua certam pecuniam petimus; nam illic ima part*e* formulae ita est IVDEX N. NEGIDIVM A. AGERIO SESTERTIVM X MILIA CONDEMNA. SI NON PARET, ABSOLVE.

§ 50. It is for a certain sum in that formula by which we claim in the intentio that a person is bound to pay us a liquidated debt, for then this final part of the formula runs as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius (say, e.g.) ten thousand sesterces; if it be not proved, absolve him.'

§ 51. Incertae uero condemnatio pecuniae duplicem significationem habet. est enim una *cum* aliqua praefinitione, quae uulgo dicitur cum taxatione, uelut si incertum aliquid petamus; nam illic ima parte formulae ita est IVDEX N. NEGIDIVM A. AGERIO DVMTAXAT SESTERTIVM X MILIA CONDEMN*A*. SI NO*N* PARET, ABSOLV*E*. uel incerta es*t* et infinita, *uel*ut si rem aliquam a possidente nostram esse petamus, id est si in rem agam*us* uel ad exhibendum; nam illic ita est QVANTI E*A* RES ERIT, TANTAM PECVNIAM, IVDEX, N. NEGIDIVM *A. AGERIO* CONDEMNA. SI NON PARET, ABSOLVIT*O*. quid er*go* es*t*? iudex si condemnet, certam pecuniam condemnare debet, etsi certa pecunia in condemnatione posita non sit.

§ 51. A condemnation in an uncertain sum of money may be one of two kinds. In the first kind it is preceded by some limitation (commonly known as taxatio). This kind may occur, for example, when we sue for an uncertain amount, in which case the concluding part of the formula runs thus: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius not more than ten thousand sesterces; if it be not proved, absolve him;' or it is named without a limitation, as when we demand our property from the possessor in a real action, or demand the production of a person or thing in a personal action, where the conclusion runs as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value; if it be not proved, absolve him.' But whatever the claim, the judex must condemn the defendant to pay a definite sum, even though no definite sum is named in the condemnatio.

§ 52. Debet autem iudex attendere, *ut* cum certae pecuniae condemnatio posita sit,

§ 52. When a certain sum is laid in the condemnatio, he must be careful not to condemn the

neque maioris neque minoris summa posita condemnet, alioquin litem suam facit. item si taxatio posita sit, ne pluris condemnet quam taxatum sit; alias enim similiter litem suam facit. minoris autem damnare ei permissum est. at si etiam ———|—| qui formulam accipit, intendere debet, nec amplius|——— certa condemnatione constringi—|———|——| usque uelit.

defendant in a greater or lesser sum, else he makes the cause his own: and if there is a limitation he must be careful not to exceed the maximum, else he is similarly liable; but he may condemn him in less than the maximum.

§ 45. Cf. § 34, comm. In an action with a formula in factum concepta, the Intentio, Si paret fecisse, 'If it appear that the defendant has done this or that'—'If the defendant's act place him in a certain class,' corresponds to the minor premiss of a syllogism of which the conclusion is: 'Then this defendant is under such and such an obligation to this plaintiff,' or 'This defendant is condemnable to perform such and such a service to this plaintiff.' The major premiss will be: 'All persons who have done such and such an act,' or, 'who belong to such and such a class, are under such and such an obligation,' or 'are compellable to render such and such a service to such and such a plaintiff.' This major premiss is withdrawn from discussion, is not permitted to be disputed; and the issue in such an action can only relate to the minor premiss; in other words, is always an issue of fact.

In an actio with a formula in jus concepta, the intentio, Si paret oportere, 'If it appear that the defendant is under such and such an obligation,' corresponds to the conclusion of a syllogism of which the minor premiss is: 'The defendant belongs to such and such a class:' and the major: 'All persons belonging to such and such a class are under such and such an obligation.' The major premiss may be an alleged rule either of law or of equity, a proposition either of civil law or of praetorian law; and in neither case is it withdrawn from discussion. The issue, that is to say, in an action with a formula in jus concepta may either relate to the minor or to the major premiss: may be either an issue of fact or an issue of law.

The following passage of Cicero speaks of actions whose formula was in jus concepta with the additional terms, ex fide bona or the like; and thus making it an actio bonae fidei. Privata enim judicia maximarum quidem rerum in juris consultorum mihi videntur esse prudentia. . . . In omnibus igitur iis judiciis in quibus EX FIDE BONA est additum; ubi vero etiam UT INTER BONOS BENE AGIER; in primisque

in arbitrio rei uxoriae, in quo est, QUOD AEQUIUS MELIUS, parati esse debent. Illi enim dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui aliena negotia curasset ei cujus ea negotia fuissent; quid eum qui mandasset eumve cui mandatum esset alterum alteri praestare oporteret, quid virum uxori, quid uxorem viro, tradiderunt, Topica, 17. 'Private suits of the highest importance turn on the doctrines of the jurist. . . . In all the actions, therefore, where the judge is instructed to look to the requirements of good faith, to the practice of honest men, or, as in the suit of a wife against her husband, to what is fair and equitable, the jurist should be ready to speak. For he is the authority on what constitutes fraud or good faith, what is good and equal, what are the mutual duties of partners, of principal and agent, whether authorized or unauthorized, or of husband and wife in respect of delivery of property.'

Actions in personam with formulae in jus conceptae may be either stricti juris or bonae fidei. The actio stricti juris is generally called condictio, § 18. (As to the proper use of the term condictio cf. Sohm, § 80, n. 6.) The gist (gîte) of the civil action of Condictio. i. e. the circumstance whereon it lay, the title or ground of action, was the increase of the defendant's fortune or patrimony by the reduction of the plaintiff's patrimony without any consideration or equivalent gain to the plaintiff. This disturbance the law restored. The simplest, and probably the earliest, instance of the principle was mutui datio, 3 § 90. Here the defendant's wealth is increased and that of the plaintiff diminished by a voluntary act of the plaintiff; but the principle equally covers cases where the relation is not knowingly and intentionally initiated by the plaintiff, e. g. payment by mistake (solutio indebiti). Many other cases of transfer of property come under the same principle, imposing on the transferee the obligation to re-transfer on account of failure of consideration (causa data, causa non secuta). From mutui datio, or actual loan, the Condiction was, as we have seen, §§ 18–20, applied or extended to Expensilatio and Stipulatio, one if not both of which, probably, were imaginary loans, that is, agreements solemnized and fortified by the fiction of a loan. We are expressly informed that this was the case with Expensilatio, 2 § 129, and from one etymology of stipulation which has been suggested (stips = pecunia) and the supposed analogy of Nexum (assuming this to have been a fictitious weighing out of bars of bronze), some writers conjecture the same of Stipulation.

The introduction of actions stricti juris is probably of more ancient date than the introduction of actions based on bona fides; the necessity, that is, of applying the power of the State to enforce the class of obligations pursued by Condictio was earlier felt than the necessity of compelling men by law to perform their so-called

obligations ex fide bona. From the antithesis of strictum jus and bona fides it might be imagined that trust, confidence, credit, reliance on good faith, were entirely foreign to civil obligations, and were only ingredients in equitable obligations. This is the reverse of the truth. Greater confidence (fides) is involved in mutui datio, greater risk is incurred by the obligee, who starts by alienating his property and making it the property of the obligor, who denudes himself, that is, of the remedy of vindicatio, than in any other of the real contracts, most of which leave the promisee, even before the invention of personal actions, armed, if need be, with the legal remedy of vindicatio. Other real contracts we can imagine left to the protection of the moral code, to the forum of conscience, to the sanction of public opinion, at a time when the immense confidence implied in a loan for consumption made the enforcement of this contract by strict legal process a matter of practical necessity. (Cf. on this subject Muirhead, Roman Law, §§ 8, 12.)

When the short, sharp, and decisive remedy of a civil action had once been invented for mutui datio, the ingenuity of contracting parties and jurists would soon extend the remedy to other relations by means of a fiction of mutui datio. Expensilation, then, and Stipulation may be regarded as artifices for transferring agreements, originally perhaps, from the ethical code to the legal code; but certainly, in later times, from the laxer equitable code to the more rigorous civil code. A great part, however, of human dealings refuses to be governed by formal conditions, and pre-arranged, pre-capitulated stipulations. Hence alongside of stipulatio and expensilatio existed Real and Consensual contracts; alongside of Condictio existed Judicis arbitrive postulatio; alongside of formulae stricti juris existed formulae bonae fidei.

The general difference between actions stricti juris and actions bonae fidei consisted in the greater latitude of discretion allowed to the judge in the latter. The principal specific points of difference were the following:

(*a*) Actions stricti juris are based on unilateral contracts, which only ground an action for one of the parties: actions bonae fidei are based on bilateral contracts, on which both parties can bring actio directa; or on semi-bilateral contracts, on which one party can bring actio directa, and the other actio contraria. So one-sided were condictions or actions stricti juris that before the time of Marcus Aurelius a set-off or counterclaim of the defendant (compensatio) could not be pleaded except as a ground of absolution in the form of Exceptio doli. Inst. 4, 6, 30.

(*b*) Actions stricti juris are governed by a literal interpretation of the words of a disposition: in actions bonae fidei the judge inquires

what was the true intention of the parties; he attends not only to express but also to implied terms of an agreement, Dig. 3, 5, 6, and, to ascertain these, takes notice of local usages, Dig. 21, 1, 31, 20. As we distinguish between the manifestation of the will or overt act of a delinquent and his intention, so bona fides distinguishes between the exact words used by contractors and their intentions. Strictum jus adheres more rigidly, at least in early times, to a grammatical or literal interpretation of a disposition, and assumes that words exactly correspond to intentions. It is then called summum jus: e. g. Verbis et literis et summo jure contenditur, Cicero.

(*c*) The ground to support any given condictio or actio stricti juris is precisely defined: whereas an actio bonae fidei, e. g. an actio empti or venditi, can be brought not only to enforce the principal contract—emptio venditio—but also to enforce any accessory agreements made at the same time (ex continenti) as the principal contract (pacta adjecta) or to obtain relief in respect of any circumstances of fraud (dolus) or intimidation (metus). In the later law, however, accessory informal agreements coalesced into a single contract when annexed to a loan (mutuum): Omnia quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae et ideo et conditiones, Dig. 12, 1, 7. In the case of a loan of money, however, interest could not be recovered on a contemporaneous, informal agreement, because the only action a loan of money could support was condictio certae pecuniae: on a loan of any other quantitas but money, such as oil or wheat, interest could be recovered, because though the intentio of the formula was certa, the value of such things was uncertain (condemnatio incerta); but this exception to the rule that interest could not be due on a mutuum seems only to have been made, in late times, a special stipulation on account of interest having perhaps been required in all cases by classical law, Cod. 4, 32, 23. Cf. Dig. 50, 16, 121 Usura pecuniae, quam percipimus, in fructu non est, quia non ex ipso corpore, sed ex alia causa est, id est nova obligatione. Savigny, § 268.

(*d*) The defence in an actio stricti juris could only allege matters which ipso jure extinguished or annihilated a claim (e. g. solutio, acceptilatio, novatio), or, if they founded an indirect answer of the defendant, had been disclosed to the praetor in the preliminary pleadings (in jure) in the form of an exceptio: whereas the judex or arbiter who tried an actio bonae fidei could consider any pleas in exception even when they were averred for the first time in the course of the trial: cum doli exceptio insit de dote actioni ut in ceteris bonae fidei judiciis, Dig. 24, 3, 21.

(*e*) In respect of the accessions (omnis causa) in which a defendant

was condemned in damages, namely fructus and usurae, there was a difference between actiones stricti juris and bonae fidei: in the former the defendant was only liable to pay these from the date of Litis contestatio; whereas in the latter he was liable from the date of Mora, 2 § 280.

(*f*) As all condemnations under the formulary system were in pecuniary damages it was necessary in the event of a condemnation that the thing in dispute should be valued in money. In actions stricti juris the moment fixed for the valuation (aestimatio) was Litis contestatio: in actions bonae fidei the date of valuation was the date of Condemnatio: In hac actione sicut in ceteris bonae fidei judiciis . . . rei judicandae tempus, quanti res sit, observatur, quamvis in stricti (juris judiciis) litis contestatae tempus spectetur, Dig. 13, 6, 3, 2. This is so uncontroverted that in another passage, which seems to fix the moment of condemnatio as the moment of aestimatio in a stricti juris action, Dig. 13, 3, 3, the opinion of the jurist Servius is perhaps inadvertently adopted by the compilers: we see elsewhere that the jurists differed on this subject, cf. Dig. 12, 1, 22. Both in stricti juris and bonae fidei actions, if a day was fixed for the performance of a contract, this day was the date of aestimatio; and if a debtor was guilty of Mora, the creditor had his election between Lis contestata and Res judicata respectively and the date of Mora. In an action on Delict the date of Valuation was none of these but the date of the Delict, i. e. the date of the inception of the obligation. Savigny, System, § 275.

(*g*) Another difference related to jusjurandum in litem, i. e. the plaintiff's sworn declaration of the value of the thing in dispute. When a defendant contumaciously disobeys a judge's order in a certain class of actions where judgment is preceded by an order (arbitrium) of the judex, namely actiones Arbitrariae, including Real actions and Personal actions brought to obtain Restitutio or Exhibitio; or when by dolus or culpa lata the defendant has disabled himself from obeying the judge's order; then the oath of the plaintiff as to the value of the subject of litigation fixes the amount of damages (aestimatio) in which the defendant will be condemned subject to the approval of the judex, who would generally allow exemplary damages. Cf. Sohm, § 53. The same rule was also applicable in actions bonae fidei. Examples of such actions are the actions Depositi, Commodati, Locati, Dotis, Tutelae, Doli, Metus, and the interdict Unde vi. In condictions or actions stricti juris it was only admissible under special circumstances; and in delictal actions when the subject of litigation had ceased to exist by the fault of the defendant, e. g. in the actio legis Aquiliae, and litis aestimatio would otherwise be impossible to the judex, he might use the plaintiff's

oath as a subsidiary evidence for ascertaining what was the selling value of the thing that had been destroyed or what therein was the plaintiff's exceptional interest.

(*h*) If performance of a contract was due at a certain place, a bonae fidei action could be brought to recover damages for non-performance at any other forum as well as at the forum of the specified place, whereas a plaintiff who brought an action stricti juris at any other forum than the forum of the place where the contract was to be executed would have incurred the penalties of Plus petitio; and to avoid this was obliged to bring his action in the form of actio Arbitraria, § 53, comm. Inst. 4, 6, 33.

The division of actions into stricti juris and bonae fidei, properly speaking, only embraces actions founded on contract and quasi-contract with a formula in jus concepta: that is to say, Real actions, actions with a formula in factum concepta, actions on delict, praetoria cognitio (cognizance by the praetor without reference to a judex) were neither stricti juris nor ex bona fide. It is probable, however, that delictal actions (e. g. the actions furti nec-manifesti and legis Aquiliae) were governed by the rules of actions stricti juris: while actiones in rem arbitrariae, and actiones in factum, and cognitio extraordinaria were governed by the rules of bonae fidei actiones. Vangerow, § 139. Cf. Inst. 4, 6, 28–30.

Many preliminary questions of law were undoubtedly decided at the initial stage of an action in jure, that is, at the appearance before the tribunal or curule chair of the praetor. At this appearance the parties were attended by counsel (haerere in jure atque praetorum tribunalibus [advocatos] De Oratore, 1, 38); and here, though the praetor would not settle a dispute about facts, many demurrers or simple issues of law or equity might be decided, and the controversy might be terminated, if it could not be brought under any rule of jus civile or of the edict, or if there was a confessio in jure, without ever reaching the stage of reference to a judex. But it was an important constitutional principle that the issue itself, which might involve questions both of law and fact, should be decided by an independent private person as judex, and not by the magistrate. This principle, weakened by the growth of extraordinaria cognitio, was abandoned under Diocletian and his successors, when, as we have seen, all private causes came to be decided either by the magistrate himself or by an official to whom he delegated his authority (judex pedaneus).

§ 46. According to the Institutes, a man might not summon his patron or parent to appear in an action without the permission of the praetor, under a penalty of fifty solidi, Inst. 4, 16, 3. A solidus or aureus was a hundred sesterces, so that we must either, with

Savigny, for ten thousand read five thousand sesterces in the text of Gaius, or suppose that Justinian reduced the penalty to half its original amount.

In the formulary system an appearance of the defendant before the praetor (in jure) was indispensable as the first stage of an action. In English law, after service of summons or proof that all proper means for the service of summons have been used in vain, the court will grant leave to the plaintiff to enter substituted service for the defendant. But in Roman law an original appearance of the defendant was necessary. On service of a summons (in jus vocatio) he was bound either to obey at once and accompany the plaintiff into court, or to send a responsible representative (vindex, § 46) in his stead, or to find security, called cautio judicio sisti (to be thus interpreted: cautio sisti in jure ad judicium ordinandum), for his appearance in jure on a future day. If he took none of these steps he was liable to an actio in factum, and he might be apprehended and taken by force (duci in jus, Dig. 2, 8, 5, 1); and any person who made a violent rescue was liable to be condemned by actio in factum to pay the amount of the plaintiff's claim, quanti ea res est ab actore aestimata, Dig. 2, 7, 5, 1. At the first appearance in court, after the plaintiff had stated which of the actions set out in the album he proposed to bring, or had shown cause why a new action not contained in the album should be granted to him (editio actionis), the defendant was required to give security (vadimonium) for his second appearance in court to receive a judex. At the second appearance, after the nomination (addictio) of the judex and the joinder in issue or delivery of the formula (litis contestatio, judicium ordinatum, judicium acceptum), there was (at all events in the legis actiones) an adjournment to the next day but one (comperendinatio), and on this day the trial before the judex (judicium) proceeded. In the formulary system, then, there were two appearances in jure, one in obedience to the in jus vocatio, and a second for the assignment of a judex. In the Libellary system which prevailed in the time of Justinian the former of these appearances was suppressed, and instead thereof the plaintiff by a libellus conventionis sued out from the court a commonitio or summons to the defendant to appear before the court. On the service of this by a public officer the defendant was required to give cautio judicio sisti, security for his appearance for the arrangement of a judicium, and in default thereof was arrested, § 184, comm.

§ 47. The formula says Ejus [aestimationem] condemnato, not Id condemnato, because the Condemnatio did not impose specific performance but only pecuniary compensation. Bethmann-Hollweg, § 87. The lawyer's manual of practice contained alternative formulae for the same ground of action. Sed tamen non parcam operae, et ut

vos in vestris formulis, sic ego in epistolis, *de eadem re alio modo*, Cicero ad Familiares, 13, 27. 'However, I will spare no trouble, and as you lawyers do in your books of formulae, I will present you in my correspondence with the same matter in another form.' Quae cum Zeno didicisset a nostris, ut in actionibus praescribi solet, *de eadem re* dixit *alio modo*, De Finibus, 5, 19. 'Zeno learnt this from the teachers of our school, and then, as the headings of the formulae say, handled the same subject in a different form.'

One great advantage of the actiones in factum was that they were available to filii familiarum. In factum actiones etiam filii familiarum possunt exercere, Dig. 44, 7, 13. It may have been for the purpose of enabling filii familiarum to sue that formulae in factum were given in some actions as well as formulae in jus. Cf. 1 § 55, comm.

We shall see hereafter that actio in factum differed from actio in jus in respect of (1) Plus petitio and in respect of (2) Novatio.

(1) An actio with a formula in factum concepta, having an intentio specifying a particular state of fact as the basis of the plaintiff's claim, cf. § 60, would be capable of plus petitio: while an actio with a formula in jus concepta would only be capable of plus petitio where the intentio was certa, e.g. condictio certae pecuniae or certae rei, not where the intentio was incerta, Quidquid paret, &c.

(2) Novatio necessaria was only produced by Litis contestatio when the formula was in jus concepta, the right of the plaintiff not being referred to in the intentio of a formula in factum, § 107.

The words Nisi restituat (cf. formula of actio depositi, § 47), exhibeat, are the clause which constitutes a formula arbitraria. In the formulary system the condemnation was always pecuniary, § 48; the defendant was always condemned by the judgment to pay the plaintiff a sum of money. By means, however, of the alternative clause, nisi restituat, &c., in a formula arbitraria the plaintiff could put pressure on the defendant to make him restore or produce to the plaintiff a specific thing which would be a remedy something like that of specific performance in English Law. Thus by this clause the judex, having pronounced against the defendant, made a preliminary order (jussus, arbitrium) for the restitution or production of the thing; and if it was obeyed the defendant was absolved, but if it was disobeyed the plaintiff was allowed to assess his own damages on oath, whereby the defendant might in fact suffer a penalty for disobedience to the order. In later times, indeed, it seems to have become the practice for the judex in case of a recalcitrant litigant to forcibly (manu militari) compel restitution. Inst. 4, 6, 31.

Actiones arbitrariae included real actions, framed as formulae petitoriae, § 92 (e.g. vindicatio, publiciana, hereditatis petitio, confessoria, hypothecaria, cf. Inst. 4, 6, 31, where only praetorian

actions are given as examples), and such other actions, whether civil or praetorian (e. g. depositi, commodati, locati, tutelae, rei uxoriae, doli, metus, interdictum de vi, §§ 162, 163), as were brought to obtain restitution or production. The formula arbitraria could not be used in an actio empti, for the object of this action was not of the nature of a restitution: nor could the formula arbitraria be employed in actions stricti juris or actions founded on delict, since a pecuniary condemnation was in these actions also sufficient remedy.

Of the formula arbitraria in a real action with a formula petitoria, §§ 91, 92, we have an instance in Cicero: Lucius Octavius judex esto: Si paret fundum Capenatem, quo de agitur, ex jure Quiritium [P. Servili] esse, neque is fundus [Q. Catulo] (cf. Roby, 2, 443, n. 1) restituetur, In Verrem, 2, 12; cf. 1, 45. In an action for the production as a preliminary to the restitution of a person or thing (ad exhibendum) the clause would be of the form 'nisi exhibeat,' 'si arbitratu tuo Aulo Agerio non exhibebitur' and generally some special modification of nisi actori satisfaciat. (As to the attempts which have been made to reconstruct this formula see Lenel, tit. xv. § 90.) In noxal actions, § 75, which are analogous in procedure to actiones arbitrariae, there was probably no clause 'nisi noxae dedat,' but the judgment was of the form Publium Maevium Lucio Titio decem aureis condemno aut noxam dedere, Inst. 4, 17, 1; the defendant being intended to exercise the election of paying damages or surrendering the author of the mischief.

As soon as the rule was established: omnia judicia esse absolutoria, § 114, that in every action a defendant might avoid condemnation by satisfying the plaintiff's claim even after litis contestatio, it might seem at first sight that the formula arbitraria was rendered unnecessary. But this was not so; for in actiones which were not arbitrariae no alternative was allowed to the judex in the condemnatio, and the damages were not meant as a penal sum to enforce obedience to the judge's order. Whereas in an actio arbitraria as soon as the arbitratus or order was pronounced, the defendant would know that he would inevitably be condemned unless he made the restitutio or exhibitio required.

The intentio of an action with a formula in factum concepta was sometimes one-limbed: e. g. Si paret . . . vocatum esse, § 46, and sometimes two-limbed: e. g. Si paret (1) Aulum Agerium rem deposuisse (2) eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, § 47. A one-limbed intentio would be used when the defence was a simple traverse or contradiction of the fact alleged by the plaintiff: a two-limbed formula would be used when the defendant confessed the fact alleged by the plaintiff, but alleged

a second fact (performance, release, novation, &c.) whereby the obligation created by the former was extinguished or counteracted.

Accordingly it would be a mistake to suppose that the clause: eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse: was equivalent to the arbitratus or clause 'Ni restituat' which in the preceding formula limits the condemnatio. The former clause raises the question whether restitution was made before the action was brought to trial (ante judicium acceptum), i. e. it is a clause in the intentio raising the question whether the action is well founded: the clause 'Ni restituat,' which concerns the condemnatio, gives the defendant power to make restitution at any time after the action was brought but before the condemnatio: and there is no reason why the clause 'Ni restituat' should not be added to the double-limbed as well as to the single-limbed formula in factum concepta or the formula in jus concepta. Thus we see that an actio in factum or an actio bonae fidei may or may not be also arbitraria (cf. Sohm, p. 289). The position of the clause 'Nisi restituat' varied: (1) in real and praetorian personal actions, the latter with an intentio in factum concepta, the words Neque (or nisi, &c.) ea res arbitrio judicis restituetur, Dig. 4, 2, 14, 11, intervened between the intentio and condemnatio; (2) in a bonae fidei actio 'Nisi restituat' followed the first clause of the condemnatio, § 47. The Edict used the clause 'Nisi restituat' or its equivalent in other actions which are not Arbitrariae: e. g. in actio de recepto:—Nautae, caupones, stabularii, quod cujusque salvum fore receperint, id Nisi restituent, in eos judicium dabo, Dig. 4, 9, 1, pr.; and against Publicani, Dig. 39, 4, 1, pr. Here, it would seem, the non-restitution would form a part of the intentio, and would refer to the time before Litis contestatio. In actio Constitutae pecuniae the intentio was composed of three allegations: a pre-existing debt, a promise to pay, and its non-fulfilment, § 171, comm.

§ 48. From the expression of Gaius, *non ipsam rem condemnat sicut olim fieri solebat*, we might suppose that statute-process (legis actio) differed from Formulary procedure in that, while in the latter the condemnation was always pecuniary, in the former, as in the last stage of Roman Law, the plaintiff recovered the specific object of litigation and not its pecuniary value. But it would be strange if Roman jurisprudence had thus retrograded, and its second stage had been less perfect than its first: and the meaning of Gaius doubtless is, that, whereas in the Formulary system a single action decided the claims of the plaintiff and assessed their money value, in the primitive system two actions were necessary; a principal action to decide on the justice of the plaintiff's claim, and a supplementary action or proceeding to transform it into money. Probus (see Huschke, Jurispr. Antejust.) apparently refers to such a proceeding in which the plaintiff

who had succeeded in his principal suit demanded an arbiter to assess the damages, when he uses the term A. L. A. or Arbitrum liti aestimandae. This arbitrium would not be reckoned among the forms of statute-process because it was merely accessory to the actio sacramenti or principal action. Bethmann-Hollweg, § 87. Keller, C. P. § 16.

Two incidents of litis aestimatio in the formulary procedure deserve notice: (1) Jusjurandum in litem, and (2) the determination of the moment to be considered by the judex in appraising the value of the plaintiff's interest.

(1) Jusjurandum in litem was not like jusjurandum necessarium a substitute for a judgment, but only one of the means of proof whereon in certain actions a judgment might be founded. These actions were (*a*) principally actiones arbitrariae, though they might be also simply bonae fidei actiones. To induce the defendant to avoid condemnation by obedience to the judge's arbitratus, if the defendant contumaciously refused obedience, or by dolus or culpa lata had rendered himself unable to yield obedience to the order of the judex, the value of the plaintiff's interest in the subject of litigation (litis aestimatio) was not ascertained, as in other cases, by the judex with or without the aid of experts, but by the oath of the plaintiff. Although he was required to name the true value (quanti actoris intersit), not a mere fancy value or so-called value of affection, yet his conscientious estimate would naturally be higher than that of an impartial judge or disinterested valuer: and the largeness of the alternative condemnation would incline the defendant to make a specific restitution.

(*b*) Even in actiones stricti juris and actiones ex delicto, if litis aestimatio, owing to the culpa of the defendant, is otherwise impossible to the judex; if, for instance, in the actio legis Aquiliae the subject has ceased to exist, then the judex may employ the oath of the plaintiff as a subsidiary evidence of the plaintiff's particular interest in the subject and of its market value. The actio injuriarum given by the Praetor is specially called aestimatoria because damages in it were assessed in this way, 3 § 224. Vangerow, § 171.

(2) The Date of valuation, or time at which the value of the specific thing due from the defendant was estimated, depended on the nature of the action. As a general rule the date of valuation in stricti juris actions was the date of Litis contestatio, in Bonae fidei and Real actions the date of Condemnatio, Dig. 13, 6, 3, 2. But if a date for performance had been fixed in a contract that date was the date of valuation, Dig. 13, 3, 4. Again, if the defendant had been guilty of Mora, 2 §§ 260–289, comm., the plaintiff had his election between any of these dates and the date of Mora, Dig. 19, 1, 3, 3, Dig. 17, 1, 37. The foregoing only relates to Real actions

and Personal actions grounded on Dispositions (contracts and quasi-contracts): in personal actions grounded on Delict, the date of valuation was the date of delict, the date, in other words, of the inception of obligation.

These different dates for valuation were expressed in the formula by a different wording of the Condemnatio. In Real actions, § 51, and in Bonae fidei actions, § 47, where the date was the date of passing judgment or condemnation, the formula contained the words: quanti ea res *erit*; in delicts, where the date of valuation was the date of delict, it contained the words: quanti ea res *fuit*, Dig. 9, 2, 2. No traces exist of the condemnatio employed in Condictions whose time of valuation was the time of Litis contestatio; but there can be little doubt that it contained the words: quanti ea res *est*, Savigny, § 275.

It has already been mentioned, 3 § 212, comm., that the value assessed might be not simply the market value of the thing but its value to the plaintiff, including mediate as well as immediate value.

In the legislation of Justinian the rules respecting litis aestimatio were of somewhat less importance, because the condemnatio would be in some cases no longer pecuniary but might command the conveyance of property (dare), delivery of possession (tradere), restitution (restituere), or production (exhibere), of the specific thing itself that was the object of litigation. The defendant was no longer invited, as in the actio arbitraria of the formulary system, but compelled by the armed force of the state, to make specific delivery or restitution, Dig. 6, 1, 68. 'If a defendant allege inability to obey an order of restitution, if the thing exists, the court uses the military power to put the plaintiff in possession, and only condemns the defendant for the mesne profits and deteriorations. If the defendant has maliciously disabled himself from restitution, he is condemned in the amount, subject to no taxation of the amount, at which the plaintiff on oath assesses his loss; if the inability is not maliciously produced, the judge assesses the damages. This applies to all interdicts and actions, real and personal, where the court orders restitution.' But in most obligations of performance or non-performance the condemnation was still necessarily pecuniary: Quia non facit quod promisit, in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus, Dig. 42, 1, 13.

§ 49. In condictio certae pecuniae, as we have seen, § 5, comm., both the Intentio and the Condemnatio are certae: in condictio Triticaria, as in Real actions, the Intentio, naming certa res, is likewise certa; but the Condemnatio, containing the words, Quanti ea res est, is incerta. A loan (mutuum) of money (pecunia certa credita) always gave rise to a condictio certae pecuniae and could not be recovered

by any other form of suit: whereas a loan (mutuum) of any other quantitas (corn, wine, oil, &c.) founded a condictio triticaria. The difference of the formulae in these actions explains the following rule of substantive law, which otherwise seems capricious: A valid informal convention (nudum pactum) for interest could be annexed to a loan of corn, wine, or oil, Cod. 4, 32, 23, but not to a loan of money, Dig. 19, 5, 24.

The reason was this: the loan of any other quantitas than money, having an incerta condemnatio, allowed the judge of a suit brought for recovery of the principal to include interest in the sum which he condemned the defendant to pay: whereas the money loan having a certa condemnatio, coinciding with the intentio in the sum it defined, the judge of a suit brought for the principal, under pain of litem suam facere, § 52, could only condemn the defendant to pay the principal.

If, then, interest on a loan of money was intended to be paid, it was necessary to secure it by a formal contract (stipulatio) which would found an actio ex stipulatu distinct from the condictio certi which might be brought for the principal: whereas interest for any other quantitas could be secured by a pactum nudum annexed to the agreement to return number, weight, or measure of the principal, and recovered in the action brought for the principal.

As the stringency of the rule respecting money loans depended on the peculiarity of the formula, it should not have been retained by Justinian after the abolition of the Formulary procedure. Savigny, System, § 268.

The wording of the formula in Condictio certae pecuniae was doubtless the reason why in the Formulary period the legatee could not recover interest on his legacy, 2 § 280.

§ 52. A judex might make a cause (liability, condemnation) his own (litem suam facere) by corruption or carelessness, Inst. 4, 5, 1, pr. Thus if he gave a wrong judgment from dolus, he was liable to be condemned in the whole amount under litigation, Dig. 5, 1, 15, 1. If from culpa, he was liable to be condemned in such damages as the judge in his discretion should assess, Dig. 50, 13, 6. This is one of the obligations classified in the Institutes of Justinian and also by Gaius in the passage of the Digest last cited, which is an excerpt from his writings, under the head of obligationes quasi ex delicto or quasi ex maleficio.

§ 53. |Si quis intentione *pl*us conplexus fu*er*it, *causa cadit*, |id est rem perdit, nec a praetore in integ*rum* restitui*tur* excep*tis* | quibusdam casibus,

§ 53. If the Intentio claim more than the plaintiff is entitled to, he loses his entire claim, and is not restored to his original position by the praetor except in a few

in q*uibus*——*p*raetor non patitur |———|——

Inst. 4, 6, 33.

§ 53 *a*. *Plus autem quattuor*| modis petitur: r*e*, tempore, loco, causa. re, u*eluti si quis pro* X |milibus quae ei debentur XX milia petierit, *aut* si *is*, *cuius* | ex parte res est, totam eam aut maiore ex parte *suam* | esse intender*it*. Inst. l. c.

§ 53 *b*. *Tempore plus petitur, ueluti si quis* | ante *diem petierit.* Inst. l. c.

§ 53 *c*. *Loco plus petitur, ueluti si quod certo loco* | dari promissum est, id *alio loco sine commemoratio*|ne eius loci petatur, uelut si *quis ita stipulatus fuerit* EPHESI | DARE SPONDES ?, d*einde* Romae p*ure intendat* DARI SIBI OPORTERE. | ———|dare mihi oportere——|

——

(2 *uersus in* O *legi nequeunt*) —— petere id es*t* non adiecto loco. Inst. l. c.

§ 53 *d*. Causa plus petitur, uelut si quis in intentione tollat electionem debitoris quam *is* habet obligationis iure: uelut si quis ita stipulatus sit SESTERTIVM X MILIA AVT HOMINEM STICHVM DARE SPONDES? deinde alterutru*m* ex his petat; nam quamuis petat quod minus est, plus tamen petere uidetur, quia potest aduersarius interdum facilius id praestare quod non petitur. similiter si quis genus stipulatus sit, deinde speciem petat: ueluti si quis purpuram stipulatus sit generaliter, deinde Tyriam specialiter petat; quin etiam licet uilissimam petat, idem iuris est pr*op*t*er* eam rationem quam proxime dixi-

cases where minors and others are not permitted by him to suffer the consequences of their mistake.

§ 53 *a*. A plaintiff may claim too much in four ways, (1) in amount, (2) in time, (3) in place, (4) in his statement of the case: in amount, if instead of ten thousand sesterces, which are due to him, he claims twenty thousand, or if being coproprietor he claims as sole proprietor, or more than his share:

§ 53 *b*. in time, if he demands to be paid at an earlier time than he stipulated for:

§ 53 *c*. in place, if he demands payment at a forum without mentioning that it is not the place at which he contracted to be paid: if, for instance, having stipulated—'Do you promise to pay at Ephesus?' he subsequently sues at Rome for payment without referring in his formula to Ephesus.

§ 53 *d*. He claims too much by his statement of the case if he deprives the debtor of an election to which he was entitled by the contract; for instance, if he stipulated to receive alternatively either ten thousand sesterces or the slave Stichus, and makes an unconditional claim for one or the other. For though the one that he claims be of lesser value, he nevertheless seems to claim too much because the other may be more convenient for the debtor to render. So if he stipulated for a genus and demands a species, stipulated, for instance, for purple and demands Tyrian purple, even though he demand the cheapest species, he claims more than his due, for the same reason. So he does if he

mus. idem iuris est, si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, uelut Stichum, quamuis uilissimum. itaque sicut ipsa stipulatio concepta est, ita et intentio formulae concipi debet. Inst. l. c.

stipulated generally for a slave and claims a certain slave, Stichus, for instance, however worthless. The intentio, then, must exactly pursue the terms of the stipulation.

§ 54. Illud satis apparet in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed QVIDQVID aduersarium DARE FACERE OPORTET intendatur, nemo potest plus intendere. idem iuris est et si in rem incertae partis actio data sit: uelut talis QVANTAM PARTEM PARET IN EO FVNDO QVO DE AGITVR actoris ESSE; quod genus actionis in paucissimis causis dari solet.

§ 54. It is clear that an intentio naming an uncertain sum as due to the plaintiff, cannot be excessive, for it claims no certain quantity, but only whatever the defendant ought to convey or perform. The same is true of real actions to recover uncertain shares, as that whereby a plaintiff claims whatever portion of an estate he may be entitled to, which kind of action is very seldom granted.

§ 55. Item palam est, si quis aliud pro alio intenderit, nihil eum periclitari eumque ex integro agere posse, quia nihil ante uidetur egisse: ueluti si is, qui hominem Stichum petere deberet, Erotem petierit; aut si quis EX TESTAMENTO DARI sibi OPORTERE intenderit, cui ex stipulatu debebatur; aut si cognitor aut procurator intenderit sibi DARI OPORTERE. Inst. 4, 6, 35.

§ 55. It is also clear that the plaintiff who claims the wrong thing in his intentio, runs no risk and can bring a fresh action because his right has not been tried; if he is entitled, for instance, to Stichus and claims Eros, or if he is entitled by stipulation and alleges in the intentio that he is entitled to have the object made over to him under a will, or if a cognitor or procurator claim to have the object made over to him in his own right instead of in the right of his principal.

§ 56. Sed plus quidem intendere, sicut supra diximus, periculosum est; minus autem intendere licet; sed de reliquo intra eiusdem praeturam agere non permittitur. nam qui ita agit, per exceptionem excluditur, quae exceptio appellatur litis diuiduae. Inst. 4, 6, 34.

§ 56. To claim too much in the intentio, as I have said, is dangerous; but a man who claims in the intentio less than his right does not forfeit his right, but cannot sue for the remainder in the same praetorship, for he is repelled by the exception against division of actions.

§ 57. At si in condemnatione plus positum sit quam oportet, actoris quidem periculum nullum est, sed ⟨*reus cum*⟩ iniquam

§ 57. If too much is claimed in the condemnatio the plaintiff is not imperilled, but, since the defendant has taken a formula

formulam acceperit, in integrum restituitur, ut minuatur condemnatio. si uero minus positum fuerit quam oportet, hoc solum consequitur ⟨*actor*⟩ quod posuit; nam tota quidem res in iudicium deducitur, constringitur autem condemnationis fine, qua*m* iudex egredi non potest. nec ex ea parte praetor in integrum restituit; facilius enim reis praetor succurrit quam actoribus. loquimur autem exceptis minoribus xxv annorum; nam huius aetatis hominibus in omnibus rebus lapsis praetor succurrit.

which is unfair to him, he may obtain a reduction of the condemnation by in integrum restitutio. If less is laid in the condemnatio than the plaintiff is entitled to, he only obtains that amount, for his whole right has been brought before the judex and is restricted by the amount laid in the Condemnatio, a limit which the judex cannot exceed; and in this case the praetor gives no relief by in integrum restitutio, for he is more ready to relieve defendants than plaintiffs, excepting always minors, whom he invariably relieves.

§ 58. Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet; et hoc est quod dicitur falsa demonstratione rem non perimi.

§ 58. If more or less is laid in the demonstratio, the plaintiff's right is not at all brought into the action and therefore remains intact, and this is the meaning of the saying, that a right is not consumed by a false demonstration.

§ 59. Sed sunt qui putant minus recte conprehendi, ut qui forte Stichum et Erot*em* emerit, recte uide*a*tur ita demonstrare QVOD EGO DE TE HOMINEM EROTEM EMI, et si uelit, de Sticho alia formul*a* agat, quia uerum est eum qui duos emerit singulos quoque emisse; idque ita maxime La*be*oni uisum est. sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et in aliis actionibus est, ueluti commodati et depositi.

§ 59. Some think that the demonstratio may be properly restricted to less than is due; thus a man who has bought both Stichus and Eros may state in his Demonstratio, 'Whereas I bought of you the slave Eros,' and sue for Stichus by another formula, because it is true that the purchaser of both is also the purchaser of each; and this was more especially Labeo's opinion. But if the purchaser of one sues in respect of two, the Demonstratio is false; and the same principle applies to actions of Loan for use and Deposit.

§ 60. Sed nos apud quosdam scriptum inuenimus, in actione depositi et denique in ceteris omnibus, ex quibus damnatus unusquisque ignominia notatur, eum qui plus quam oporteret demonstrauerit, litem perdere: ueluti si quis una *re* deposita

§ 60. I have read in some writers that in actions of Deposit, and wherever condemnation involves infamy, a plaintiff loses his action if his demonstratio exceeds the amount due, for instance, if he deposited one thing and says in the demonstratio that

duas pluresue ⟨*se de*⟩posuisse demonstrauerit; aut si is, cui pugno mala percussa est, in actione iniuriarum etiam aliam partem corporis percussam sibi demonstrauerit. quod an debeamus credere uerius esse, diligentius requiremus. certe cum duae sint depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notauimus, et in ea quidem formula, q*uae* i*n* ius concepta est, initio res de q*ua* agitur demonstratorio modo designetur, deinde inferatur iuris cont*en*tio his uerbis QVIDQVID OB EAM REM ILLVM ILLI DARE FACERE OPORTET; in *ea* uero quae in factum concep*ta est*, *stat*im initio i*n*tentionis alio modo res de qua agitur designetur his uerbis SI PARET ILLVM APVD ⟨*ILLVM REM*⟩ ILLA*M* DEPOSVISSE: dubitare non debemus, quin si quis in formula, quae in factum conposita est, plures res designauerit quam deposuerit, litem perdat, quia in intentione pl*us* pos—

(24 *uersus in C legi nequeunt*)

——— Inst. 4, 6, 36–38

(24 *uersus in C legi nequeunt*)

Inst. 4, 6, 39.

he deposited two, or if he was struck in the face and his demonstratio in an action of assault says he was struck in other parts also. But let us carefully examine this opinion. There are two formulas of the action of Deposit, one framed in jus, the other in factum, as we said before, § 47. The formula in jus begins by defining the title or ground of action in the demonstratio, and then in the Intentio which follows introduces as a consequence the question of law in these terms: 'Whatever the defendant ought on account of this thing to convey or perform.' Whereas the formula of fact commences at once without any preceding demonstratio with another form of intentio designating the ground of action, thus: 'If it be proved that such a plaintiff deposited such a thing with such a defendant.' Certainly in the latter case, that is, in a formula of fact, if the plaintiff asserts that he deposited more things than he really deposited, he loses the action, because the excess is in the intentio . . . .

§ 53 *c*. According to Roman law a judex could only condemn a defendant to make payment at a place within the jurisdiction. Hence when the Forum or jurisdiction of a court in which an action on a contract is brought happened to differ from the place specified in the contract as the place where a certain act (payment, delivery, conveyance, &c.) was to be performed, if the contract was such as naturally to ground a Condictio (actio stricti juris), he could not condemn; and so in order to avoid the fault of Plus petitio, which would be fatal to the present claim and to any subsequent claim on the same contract, it was necessary to sue, not by a Condictio which would be the proper form if the action were brought at the stipulated place of performance, but by a special kind of formula Arbitraria (actio de eo quod certo loco). In such an actio Arbitraria the judge could

consider the difference of place and meet the demands of equity by increasing or diminishing the amount which his arbitratus required the defendant to pay in order to avoid condemnatio. If the contract were such as to give rise to an actio bonae fidei, it would not be necessary to sue by formula Arbitraria in order to avoid Plus petitio, for the judex of an actio Ex bona fide had more discretion than the judex of a Condictio and by the wording of his commission, Ex fide bona, could allow for the difference of place if performance were enforced at a place different from that specified in the contract. A defendant who lost an action was bound to make payment at the forum where the action was brought: ibi erit praestandum ubi petitur, Dig. 30, 47, 1. So where no place of performance was implied or fixed by the contract, the plaintiff could sue the defendant, in any place where the condemnation could be enforced against him.

To understand the foregoing we must consider the various tribunals before which an action can be instituted: at what forum or before what judge a plaintiff can sue a defendant.

The Forum at which an action can be brought is twofold: it is either General or Special. The General forum is the forum of the domicil of the defendant: actor rei forum, sive in rem sive in personam sit actio, sequitur, Cod. 3, 19, 3. Juris ordinem converti postulas, ut non actor rei forum sed reus actoris sequatur, Cod. 3, 13, 2. See 3 § 75, comm.

The Special forum depends on the nature of the right to be litigated: or the department of the code to be applied.

The special forum of a Real right may be the forum where the Res (object of property, servitude) is situated (forum rei sitae). This was not established in classical Roman law, when execution related not to res but to litis aestimatio, but only in the later period. Non ejusdem provinciae praesidem adeundum ubi res de quibus agitur sitae sunt, sed in quâ is qui possidet sedes ac domicilium habet. Frag. Vat. § 326.

The special forum of an Obligation is generally, in Roman law, the forum of the place where the act is covenanted to be performed (forum Solutionis). It was when a stipulation was enforced at the general forum of the defendant instead of at the special forum of the stipulation that it was necessary to use the formula Arbitraria. For the rules of English law on this subject, which are of a less restricted character than those of Roman law, see order 11 rule 1.

The special forum of a Delict is the place where the delict was committed.

The special forum of Insolvency coincides in Roman law with the general forum, i. e. is the domicil of the insolvent.

The special forum of the action for claiming anything by title of an inheritance (hereditatis petitio) is the forum of the place where

the object of inheritance is situated which the heir is claiming (forum rei Sitae).

Distinct from the question of the Forum that has jurisdiction over a right or obligation is the question of the Law that defines such right or obligation: what local, municipal, or national Law governs the relation of the plaintiff and defendant, and has to be administered by the Forum, whatever and wherever it may be, that exercises jurisdiction.

The question of the Forum before which a suit must be instituted and of the particular Law which such Forum must administer may arise (1) within the limits of a single state when divided, like the Roman empire, into municipalities with separate jurisdictions and, to a certain extent, separate laws: or (2) in more or less intimate unions of cantons, or states, such as we see in Switzerland, Germany, America; or (3) between different sovereign states.

The territorial, local, or municipal law that governs a particular question may be determined by various circumstances such as the domicil or the nationality (as in some modern codes) of a person (testator, intestate, insolvent, husband, disposer, debtor, &c.): the place where the object of property is situated: the place of performance of an act past or future (disposition, stipulated service): or the place where the formalities of an act were transacted.

Thus in a question of Ownership the law to be applied may be the lex loci rei Sitae. E. g. in France property in goods passes by contract of sale, in Germany by tradition. A Frenchman in France sells to another Frenchman his goods in Germany. The property only passes by tradition. A German in Germany sells to another German his goods in France. The property passes by the mere contract of sale.

In a question of contract the law to be applied generally depends on the intention of the parties as shown by their agreement; thus the law which is intended is often presumed to be that of the place of performance.

The Roman doctrine that Inheritance is a Universal succession implies that the ideal patrimony has its single seat in the nationality or domicil of the heritage-leaver and is governed by the law of that nationality or domicil. Thus the law which governs Succession is not, after the analogy of the former cases, the law of the special forum of Succession: for whereas the law which governs Succession is the law of the heritage-leaver's nationality or last Domicil, we have seen that the special forum of Succession, in respect of objects of ownership, is the forum rei Sitae.

But though the law of the testator's nationality or last domicil principally governs his dispositions (questions relating to institution,

disinheritance, preterition, inofficiositas, legacies, &c.), yet there are some elements of a will to which other laws must be applied. The capacity of the testator (testamenti factio, commercium) must exist both at the date of executing the will and at the date of his decease: and must be tested at the former date by the law of his then domicil. Again the capacity of honoratus (heir or legatee) is governed by the law of the domicil of honoratus at the time of the testator's death. Indeed in Roman times, though not in modern Germany, this capacity was required at tria tempora, the making of the will, the death of the testator, and the acquisitio by honoratus, 2 §§ 109–114, comm., and was governed at each period by the law of his then domicil.

The Capacity of a person for contracting and otherwise disposing is governed by the law of his nationality or domicil: with this reservation, that Majority once attained cannot be divested in respect of past acts by a mere change of domicil: by settling, that is to say, in a new domicil where majority comes later.

The validity of the Form of any disposition (contract, marriage, testament, &c.) may depend on the law by which the substance of the disposition is governed (the law of the stipulated place of performance, the law of the husband's nationality or domicil, the law of the testator's domicil at the time of making his will). But inconveniences would arise if this law were exclusive. For instance, a German will can only be made with the assistance of a court. In France no court is authorized to give its assistance to the execution of a will, which is the function of the Notary. A German, then, domiciled in Germany but dying in France, would be unable to execute a will if he could only do it in the form prescribed by German law. Accordingly, as an alternative to the law that governs the disposition, the law of the place where the disposition is made is accepted: and the form of a disposition is valid if it satisfies either the proper law of the disposition or the law of the territory in which the disposition is made. The applicability of the latter law is expressed by the maxim: Locus regit actum. We must except the forms of Alienation which must always satisfy the lex rei sitae.

Procedure is governed by the law of the forum where a suit is instituted. Dilatory exceptions, accordingly, as based merely on rules of procedure, depend on the law of the forum. But the material contentions of the defence, that is, the rights of the defendant, whether ipso jure extinctive, or per exceptionem peremptoriam counteractive, of the rights of the plaintiff, are governed by the same law as the rights of the plaintiff; that is by the local law that governs the obligation. The Exceptio Sc. Macedoniani and Sc. Vellaeani, however, as relating to personal Capacity, are governed by the law of the domicil of the person in question.

Procedure in Bankruptcy being a partial or imperfect Execution, its leading feature, the Classification or marshalling of creditors, like other matters of Procedure, is governed by the law of the Forum by which the execution is superintended, which will, generally speaking, be the law of the nationality or domicil of the Insolvent. The priorities of the purely personal creditors, that is to say, will be governed by the law of the forum: but where there are hypothecary creditors who hold mortgages over property of the insolvent in other lands, their priorities involving questions of Real rights will depend on the lex rei sitae. The preliminary Proof by the creditors of their particular claims will be governed by the law (law of the stipulated place of performance, &c.) which according to general rules is applicable to the obligations they respectively seek to enforce.

Exceptions to most of the preceding rules are produced not only by general variations in principle between the administration of Private International Law in different states but also by the existence of Imperious and Anomalous laws: laws based on religious, moral, political, financial, administrative, instead of purely civil, motives: such as laws relating to heresy, usury, gambling, revenue, mortmain; or laws implying institutions (e.g. slavery, civil death) unrecognized by other states. Each forum enforces its own Imperious or Anomalous laws, and disregards those of its neighbour. For instance a monogamist forum will not enforce polygamistic laws, nor will any forum enforce the penal laws which a neighbour levels against its coreligionists.

Obligation founded on Delict is always the subject of such Imperious laws: accordingly civil obligation ex delicto, unlike obligation ex contractu, is governed by the laws of the state in which it is remedied.

The rules of which the above are a specimen constitute what is called the Comity of nations or Private international law. The ideal aim of the Comity of nations is: that the judgment passed on any controversy should be identical whatever may be the tribunal that happens to exercise jurisdiction. Savigny, System, vol. 8. Cf. Westlake, Treatise on Private International Law, and Dicey, Conflict of Laws.

§ 53 *b*. The penalty of plus petitio in respect of time was reduced by Zeno, who merely doubled the term that was still to run before payment, and required the creditor to pay the costs of the former action before he brought a second, Cod. 3, 10, 1. The effect of this was to change the meaning of the term 'dilatoria,' which, as applied to an exceptio and opposed to peremptoria, denoted an exceptio alleging plus petitio in Time.

When Gaius wrote, such an exception, if successfully alleged, was

just as fatal to the creditor as an exceptio peremptoria. It was temporary, not in respect of its effects, but of the limited period during which it was at the command of the debtor. But after Zeno such an exceptio was temporary in its effects, and did not prevent a renewal of the action after a certain lapse of time, that is, after the expiration of the term originally fixed for the payment, and an additional term measuring the temporal excess of the plaintiff's claim. Justinian retained Zeno's law in respect of Time, and disarmed the other modes of plus petitio of their terrors, by merely making the creditor liable to three times the amount of the loss that his exorbitant claim had caused to the debtor, particularly in respect of the fees (sportulae) of the executive officers (executores), Cod. 3, 10, 2.

§ 55. A plaintiff who had made a mistake in the subject of his claim was allowed by Justinian to amend his claim without instituting a new action.

It seems from this paragraph that the title or ground of action (causa debendi) was sometimes specified in the Intentio. Perhaps this was done in condictio ex testamento and actio ex stipulatu, which had no Demonstratio, and then availed to prevent the consumption of the right of action; that is, the allegation of the plea of Res judicata when the plaintiff afterwards claimed the same sum but founded his claim on a different title. Cf. § 131.

§ 56. A plaintiff whose intentio claimed less than he was entitled to was allowed by Zeno to obtain the full amount without instituting a new action, Inst. 4, 6, 34.

§ 58. As plus petitio implies intentio certa, and the existence of a demonstratio involves intentio incerta, it follows that excess in the demonstratio cannot involve plus petitio. Again, as the demonstratio does not determine what is the res in judicium deducta, a falsa demonstratio cannot consume the true ground of action.

§ 60. It appears that some jurist had regarded the first clause of an actio in factum, si paret . . . fecisse, as a demonstratio. Gaius himself, in speaking of this clause, used ambiguous terms, nominato eo quod factum est, § 46. But it is clear from § 60 that he holds it to be no Demonstratio, but an Intentio.

The plaintiff who lost an actio in factum did not, strictly speaking, lose his right to bring another action, for novatio, or transformation of his original right into a right to have judgment, was only operated by the commencement of a personal action in jus. But this made no practical difference, for though his own right (ipsum jus) was not extinguished, it was counterpoised by an opposite right of the defendant based on the claim having been brought to trial (exceptio rei in judicium deductae or judicatae), which would cause any suit instituted by the plaintiff to be dismissed.

§ 61. ——— continetur, ut habita ratione eius, quod inuicem actorem ex eadem causa praestare oporteret, in reliquum eum cum quo actum est condemnare. Inst. 4, 6, 30.

§ 61. In bonae fidei actions the judex has full power to assess on good and equitable grounds the amount due to the plaintiff, and can take into account the cross demand in the same transaction of the defendant, and condemn the defendant in the remainder.

§ 62. Sunt autem bonae fidei iudicia haec: ex empto uendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae, ⟨*commodati, pigneraticium, familiae erciscundae, communi diuidundo*⟩. Inst. 4, 6, 28.

§ 62. Bonae fidei actions are those of Purchase and Sale, Letting and Hiring, Unauthorized Agency, Agency, Deposit, Fiduciary conveyance, Partnership, Guardianship, dotal property, [loan of use, Pledge, Partition of inheritance, Partition of property held in common].

§ 63. Liberum est tamen iudici nullam omnino inuicem conpensationis rationem habere; nec enim aperte formulae u*e*rbis praecipitur, sed quia id bonae fidei iudicio conueniens uidetur, id*eo* officio eius contineri creditur.

§ 63. The judex may, if he pleases, refuse to take any account of a set off, since he is not expressly instructed by the terms of the formula to do so, but as it seems suitable to the nature of a bonae fidei action, the power is assumed to be contained in his commission.

§ 64. Alia causa est illius actionis qua argentarius experitur: nam is cogitur cum conpensatione agere, et ea conpensatio uerbis formulae exprimitur: adeo quidem, u*t* ab initio conpensatione facta minus intendat sibi dar*i* oportere. ecce enim si *sestertium* X milia debeat Titio, atque ei XX debeantur, sic intendit SI PARET TITIVM SIBI X MILIA DARE OPORTERE AMPLIVS QVAM IPSE TITIO DEBET.

§ 64. It is otherwise in the action instituted by a banker for the balance of an account, for the banker is compelled to include a set off in his action and make express recognition of it in his formula, so much so that he must allow for any set off from the first, his Intentio only claiming the balance. Thus if he owes ten thousand sesterces to Titius, and Titius owes him twenty thousand, his Intentio runs as follows: 'If it be proved that Titius owes him ten thousand sesterces more than he owes Titius.'

§ 65. Item *b*onorum emptor cum deductione agere iube*tur*, *id est ut* in hoc solum aduersarius eiu*s* condemnetur quod superest, deducto eo quod inui-

§ 65. Likewise the purchaser of an insolvent debtor's estate must when he sues do so with a deduction in his formula, that is in the condemnatio only require the

cem ei bonorum emptor defraudatoris nomin*e* debet.

defendant to pay what he owes after deduction of what is due to him in turn from the purchaser as representing the debtor who has failed.

§ 66. Inter conpensationem autem quae argentario opponitur, et deductionem quae obicitur bonorum emptori, ill*a* differentia est, quod in conpensatione*m* hoc solum uocatur, quod eiusdem generis et naturae est: ueluti pecunia cum pecunia conpens*a*tur, triticum cum tritico, uinum cum uino; adeo ut quibusdam plac*e*at no*n* omni modo uinum cum uino aut triticum cum tritico conpensandum, sed ita si eiusdem naturae qualitatisque sit. in deductionem autem uocatur et quod non est eiusdem generis. itaque ⟨s*i* ——⟩; si uero pecuniam petat bonorum emptor et inuicem frumentum aut uinum is debeat, deduct*o* quanti id erit in reliquum experitur.

§ 66. Between the set off which is made against the claim of the banker and the deduction from the claim of the purchaser of an insolvent's estate there is this difference, that set off is confined to claims of the same genus and nature; money, for instance, is set off against money, wheat against wheat, or wine against wine; and some even hold that not every kind of wine or every kind of wheat may be set off against wine and wheat, but only wine and wheat of the same nature and quality. Deduction, on the contrary, is made of a debt of a different genus. Thus, if a purchaser of an insolvent's estate sues for money owed to the insolvent a person to whom he himself, as the insolvent's successor, owes corn or wine, he has to deduct the value of the corn or wine and bring the action only for the residue.

§ 67. Item uocatur in deductione*m* et id quod in diem debetur; conpensatur autem hoc solum quod praesenti die debetur.

§ 67. Again, deduction is made of debts not yet due, set off only of debts already due.

§ 68. Praeterea conpensationis quidem ratio in intentione ponitur; quo fit, ut si facta conpensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. deductio uero ad condemnationem ponitur, quo loco plus petenti periculum non interuenit; utique bonorum emptore agente, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.

§ 68. Again, set off is inserted in the Intentio, and if the Intentio of the banker is one sesterce more than the balance, he loses his present cause and on this account also his future claim; whereas the deduction is introduced in the Condemnatio, where an excessive claim is not hazardous; especially as the purchaser of an insolvent's estate, though the debt he claims is certain, draws up the condemnatio for an uncertain amount.

§ 61. Compensatio or cancelling of cross claims by setting off one against another (compensatio est debiti et crediti inter se contributio, Dig. 16, 2, 1) was originally limited to claims of the parties growing out of the same ground (ex eadem causa, § 61), hence there could be no set-off in an action for enforcing a unilateral obligation; but the transaction must be one that generated either a bilateral obligation and gave to both parties an actio directa, e.g. emptio venditio,—or a semi-bilateral obligation, giving to one party actio directa and to the other actio contraria, e.g. commodatum. In other words, Compensatio was not possible in actions stricti juris, such as condictio, but confined to actions bonae fidei. The emperor Marcus Aurelius allowed Compensatio to be urged against claims based on transactions that could only generate unilateral obligations, and so made the identity of title (eadem causa) unnecessary: in other words, he admitted Compensatio in Condictiones or stricti juris actiones. (It was merely by inadvertence that Justinian in compiling his own Institutions out of those of Gaius retained the words ex eadem causa in the definition of Compensation, Inst. 4, 6, 39. Savigny, § 45.)

In an actio bonae fidei, to which it had been previously limited, Compensation of the defendant's counterclaim ex eadem causa would not require to be commanded by an exceptio doli, but would be included in the officium judicis; i.e. could be made by the judex if it seemed good to him (cf. § 63 as newly deciphered by Studemund, *liberum est tamen judici nullam omnino invicem compensationis rationem habere*) in virtue of the terms EX BONA FIDE contained in the formula which gave him his commission. In an actio stricti juris, after the rescript of Marcus Aurelius, the judex could be obliged to make compensation by the Exceptio Doli mali, but only if the exception was expressly inserted in the formula: Sed et in strictis judiciis ex rescripto divi Marci, opposita doli mali exceptione, compensatio inducebatur, Inst. 4, 6, 30. The effect of this change seems to have been to establish Compensatio for the first time as a definite right of the defendant, which the judex must allow him to make use of, and this may possibly be the meaning of the much controverted phrase 'ipso jure compensari,' Inst. 4, 6, 30; Dig. 16, 2, 21; Cod. 4, 31, 14. Cf. Dernburg, Geschichte und Theorie der Kompensation, p. 310; Pandekten, § 62, notes 13, 14.

The exception was of the form: Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat, § 119: and we find in the Digest a definition of Dolus that seems intended to apply to a claim for Compensation: Dolo facit qui petit quod redditurus est, Dig. 44, 4, 8.

Some writers hold that this exceptio empowered the judex, not to make compensation but simply to give judgment against the plaintiff on the ground of his making what according to the principles of bona

fides amounted to Plus petitio; and they explain that this was not so iniquitous as at first sight it may appear, as the loss of the action would only be a penalty to the plaintiff for refusing to employ a formula containing a Compensatio or Deductio, the usage of these formulae being in effect generalized by the rescript of Marcus Aurelius.

Vangerow, on the other hand, § 607, observes that we have no evidence that an intentio modified by a Compensatio or Deductio was ever employed by any plaintiff but the Argentarius and Bonorum emptor: while we are expressly informed by Theophilus 4, 6, 30, that the effect of Exceptio doli might be to diminish the condemnatio, instead of the usual one of entirely absolving the defendant; which again is consistent with what the jurist Paulus says of the general nature of exceptio: Exceptio est conditio quae modo eximit reum condemnationi, modo minuit damnationem, Dig. 44, 1, 22. Probably before the law of Marcus Aurelius the exceptio doli mali, when used in this case, had not the effect of diminishing the condemnation, and so did not admit the principle of set-off, but absolved the defendant entirely. Cf. Sohm, § 89.

As Gaius flourished under Marcus Aurelius, and makes no mention of his rescript, we must infer that it was issued after the publication of his Institutes. To be capable of set-off against one another the claims must be of the same kind—money against money, wheat against wheat—and so especially of res fungibiles—and these claims must be now due. But the defendant might set off obligatio naturalis, which was not enforceable by action against obligatio civilis of the plaintiff. Etiam quod natura debetur venit in compensationem, Dig. 16, 2, 6. But claims originally different in kind may be set off against one another, if they are reduced to a money value. And this principle enabled Justinian to extend Compensation to Real actions, Cod. 4, 31, 14; Inst. 4, 6, 30.

§§ 66–68. The balance for which the banker sued was not the balance (deductio) of a Personal account, but the balance of one of the Real accounts for corn, wine, oil, &c., into which the debtor's total personal account was subdivided. The law courts, that is, took notice of the customary practice of the book-keepers, and a question naturally arose as to the extent to which a personal account could be subdivided. Deductio of argentarius and bonorum emptor, as is seen by the text, differs in principle from compensatio, and between the deductio of the two kinds of plaintiff, who had thus to sue, there are important differences, especially in regard to the effect of not complying with the requirement. The argentarius, as we are told, is bound to make the deduction in the intentio of the formula, and so, if he claims more than the correct balance, makes a plus petitio, thereby forfeiting his

whole claim. But the deduction, by the bonorum emptor of the claims of the debtors of the estate against the insolvent, is only referred to in the condemnatio of the formula, and so as Gaius tells us here, and also in § 57, is not attended with the same danger.

§ 68. It was the duty of the Argentarius to keep the accounts of his customers: whereas the Bonorum emptor might well be ignorant of the transactions of the insolvent. This explains the greater rigour with which the Argentarius was treated.

A defendant was allowed to deduct his cross demand or independent debt from the demand of the plaintiff by the English courts of Equity, but not by the courts of Common law, until the Statutes 2 Geo. II, c. 22; 8 Geo. II, c. 24, introduced the plea of set-off into the courts of Common law.

§ 69. Quia tamen superius mentionem habuimus de actione, qua in peculium filiorum familias seruorumque ag*i*tur, opus est, ut de hac actione et de ceteris, quae eorundem nomine in parentes dominosue dari solent, diligentius admoneamus. Inst. 4, 7, pr.

§ 69. As we have mentioned [§ 61, Inst. 4, 6, 36] the action brought against the Peculium of filiusfamilias and of slaves, we must explain more fully this and the other actions by which fathers and masters are sued on account of their sons or slaves.

§ 70. Inprimis itaque si iussu patris domin*i*ue negotium gestum erit, in solidum praetor actionem in patrem dominumue conparauit; et recte, quia qui ita negotium gerit, magis patris dominiue quam filii seruiue fidem sequitur. Inst. 4, 7, 1.

§ 70. Firstly, if it was at the bidding of the father or master that the plaintiff contracted with the son or slave, the father or master may be sued for the whole amount of the debt contracted, and rightly so, for in this case the person with whom the contract is made looks rather to the credit of the father or master than to that of the son or slave.

§ 71. Eadem ratione conparauit duas alias actiones, exercitoriam et insti*t*oriam. tunc autem exercitoria locum habet, cum pater dominusue filium seruumue magistrum nau*i* praeposuerit, et quid cum eo eius rei gratia cui praepositus fuerit [negotium] gestum erit. cum enim ea quoque res ex uoluntate patris dominiue contrahi uideatur, aequissimum esse

§ 71. On the same principle the praetor grants two other actions, the actio exercitoria and institoria, one on account of a debt contracted by a ship-captain (magister), the other on account of a debt contracted by a manager of a shop or business (institor). The actio exercitoria lies against a father or master who has appointed a son or slave to be captain of a ship, to recover a debt incurred

uisum est in solidum action*em* ⟨*in eum*⟩ dari. qui etiam, licet extraneum quisqu*e* magistrum nau*i* praeposuerit siue seruum siue liberum, tamen ea praetoria actio in eum redditur. ideo autem exercitoria actio appellatur, quia exercitor uocatur is, ad quem cottidianus nauis quaestus peruenit. insti*t*oria uero formula tum locum habet, cum quis tabernae aut cuilibet negotiationi filium seruumue aut quemlibet extraneum siue seruum siue liberum praeposuerit, et quid cum eo eius rei gratia cui praepositus est contractum fuerit. ideo autem insti*t*oria uocat*ur*, quia qui tabernae praeponitur insti*t*or appellat*ur*. qua*e* et ipsa formula in solidum est.

Inst. 4, 7, 2.

by the son or slave on account of the ship. As such a contract seems also to be made with the consent of the father or master, it has appeared most equitable that an action should be given to make him liable for the whole debt. But still further even if a man appoint another person's slave or a freeman over his ship, he may nevertheless be sued by this praetorian action. The action is called Exercitoria because exercitor signifies a person who takes the daily profits of a ship. The formula Institoria is applicable in the case of a man appointing his son or slave or another person's slave or a freeman to manage a shop or any business for him, should any debt be contracted by such person on account of that business. It is called Institoria because a person set over to manage a shop is called Institor, and the action is also brought to recover the whole amount of the debt.

§ 72. Praeterea tributoria quoque actio in patrem dominumue constituta est, cum filius seruusu*e* in peculiar*i* merce sciente patre dominoue negotietur. nam si quid eius rei gratia cum eo contra*ctum* fuerit, ita praetor ius dicit, ut quidquid in *his* mercibus *erit quodque inde receptum erit, id inter* ⟨*patrem*⟩ *dominum*⟨*ue*⟩, *si quid ei debebitur, et ceteros creditores pro rata portione distribuatur.* Inst. 4, 7, 3.

(*fere* 21 *uersus in C legi nequeunt*)

§ 72. Besides the above, an action has also been established called Tributoria, against a father or a master of a slave, when their son or slave carries on some business with his Peculium with the knowledge of his father or master. For if any contracts are made with them on account of that business the praetor orders that whatever capital belongs to this business and any profits made in it shall be distributed between the father or master and the other creditors in proportion to their respective claims against the son or slave, and since the praetor permits the father or master to effect the distribution, this actio tributoria is provided to meet the case of a creditor complaining that he has received less than his share.

§ 72 *a*. Praeterea introducta est actio de peculio deque eo, quod in rem domini uersum erit, ut, quamuis sine uoluntate domini negotium gestum erit, tamen siue quid in rem eius uersum fuerit, id totum praestare debeat, siue quid non sit in rem eius uersum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem domini uersum intellegitur, quidquid necessario in rem eius impenderit seruus, ueluti si mutuatus pecuniam creditoribus eius soluerit aut aedificia ruentia fulserit aut familiae frumentum emerit uel etiam fundum aut quamlibet aliam rem necessariam mercatus erit. Itaque si ex decem ut puta aureis, quos seruus tuus a Titio mutuos accepit, creditori tuo quinque aureos soluerit, reliquos uero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris uero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si toti decem aurei in rem tuam uersi fuerint, totos decem aureos Titium consequi posse. licet enim una est actio, qua de peculio deque eo quod in rem domini uersum sit agitur, tamen duas habet condemnationes. itaque iudex, apud quem de ea actione agitur, ante dispicere solet, an in rem domini uersum sit, nec aliter ad peculii aestimationem transit, quam si aut nihil in rem domini uersum intellegatur aut non totum.

Inst. 4, 7, 4.

§ 72 *a*. There has also been instituted the action in respect of Peculium (de peculio) and of what has been converted to the profit of the father or master (de in rem verso), since notwithstanding the fact that a contract has been made without the consent of the father or master, yet if any portion has been converted to his profit, he ought to be altogether liable to that amount; or if no portion has been converted to his profit, he ought to be liable to the extent of the peculium. Conversion to his profit is understood to mean any necessary expenditure by his son or slave on his account, as borrowing money with which the son or slave pays his creditors, repair of his falling house, purchase of corn for his household of slaves (familia), purchase of an estate for him, or any other necessary. So if out of ten thousand sesterces which your slave borrowed of Titius he paid your creditor five thousand, and spent the remainder in some other way, you are liable for the whole of the five thousand, and for the remainder to the extent of the peculium. If the whole ten thousand was applied to your profit you are liable for the whole. And although the action in respect of Peculium and of conversion to profit is only one action, nevertheless it has two separate condemnations. Thus the judex first looks to see whether there has been a conversion to the profit of the father or master, and does not proceed to estimate the value of the peculium unless there was no such conversion or only a partial conversion.

§ 73. *Cum autem quaeritur, quantum in peculio sit, ante de*ducitur, quod patri domi-

§ 73. In ascertaining the amount of the peculium, deduction first is made of what the son or

noue quique in eius potestate sit a filio seruoue debe*tur*, et quod superest, hoc solum peculium esse intellegitur. aliquando tamen id, quod ei debet filius seruusue qui in potestate patris dominiue sit, non deducitur ex peculio, uelut si is cui debet in huius ipsius peculio sit. Inst. l. c.

§ 74. Ceterum dubium non est, quin et si, qui iussu patris dominiue contraxit cuique exercitoria uel insti*to*ria formula conpetit, de peculio aut de in rem uerso agere possit. sed nemo tam stultus erit, ut qui aliqua illarum actionum sine dubio solidum consequi possi*t*, in difficultate*m* se deducat probandi*i* habere peculium eum cum quo contraxerit, exque eo peculio posse sibi satisfieri, uel id quod persequitur in rem patris dominiue uersum esse.

Inst. 4, 7, 5.

§ 74 *a*. *Is* quoque, cui tributoria actio conpetit, de peculio uel de in rem uerso agere potest. sed huic sane plerumque expedit hac potius actione uti quam tributoria. nam in tributoria eius solius peculii ratio habetur, quod in his mercibus est *q*uibus negotiatur filius seruusue quodque inde receptum erit; at in actione ⟨*de peculio*⟩ peculii totius. et potest quisque tertia forte aut quarta uel e*tiam* minore parte peculii negotiari, maximam uero partem peculii in aliis rebus habere; longe magis si potest adprobari, id quod ⟨*dederit is qui cum filio seruoue*⟩ contraxit in rem patris dominiue uersum esse, ad hanc actionem transire debet; nam,

slave owes to the father or master or to a person in their power, and the residue only is regarded as peculium. Sometimes, however, what the son or slave owes to a person in the power of their superior is not deducted, for instance, if it is owed to a vicarius, that is to a slave belonging to the peculium of the son or slave.

§ 74. There is no doubt that both a creditor who has contracted at the bidding (jussu) of the father or master with a son or slave, and one who might sue, by exercitoria or institoria, may bring the action in respect of the peculium or of conversion to profit; but no one would be so foolish, who could recover the whole by one of the former actions, as to undertake the trouble of proving the existence of a peculium and that it was sufficient in amount to satisfy his claim, or that the transaction had been for the benefit of the father or master.

§ 74 *a*. A plaintiff who has the actio Tributoria may bring actio de peculio et in rem verso, and will generally find it expedient to do so; for actio Tributoria only relates to that portion of the peculium which consists of the trading capital and the profits of the business with which the son or slave traded, but other actions extend to the whole peculium; and a man may trade with only a third or fourth or less part of his peculium and have the greatest part of it invested in other concerns. A fortiori, if the plaintiff can prove that what he gave the son or slave in fulfilment of the contract was converted to the profit of the father or master, he should use this action, viz. de peculio et in rem verso, instead of

ut supra diximus, eadem formula et de peculio et de in rem uerso agitur. Inst. l. c.

the actio Tributoria; for, as I said above, the same formula lies both in respect of peculium and of what has been converted to uses.

§ 71. The term Institor includes any one set over a business—cuicumque negotio praepositus sit institor recte appellabitur—and so a banker (mensae praepositus), bailiff (agris colendis), foreman of a trade (mercaturis), bagman (sed etiam eos institores dicendos placuit, quibus vestiarii vel lintearii dant vestem circumferendam et distrahendam, quos vulgo circitores appellamus, Dig. 14, 3, 5), and any similar agent, of whatever age or sex (nam et plerique pueros puellasque tabernis praeponunt, Dig. 14, 3, 8).

It seems probable that the actio exercitoria and institoria were first granted by the praetor in the common case of the magister or institor being a son or slave of his employer, when a third party contracting with them would either have no remedy at all, or in respect of the filius familias one which would often be ineffective, and that they were afterwards extended to cases where the magister or institor were free persons and slaves, extraneous to the family of the employer.

The liability of the shipowner (exercitor) and of the master (dominus) on account of the contracts of the free captain (magister), and of the free manager, overseer, factor (institor) made within the scope of their employment, was the germ or first manifestation of the institution of contractual Agency, an institution that did not reach its complete development in Roman jurisprudence. For in this system an agent could not be a mere instrument of acquiring a contractual obligation for his employer, but was regarded as being himself a party to any contract he concluded on account of another. Thus the liability of the exercitor or dominus existed alongside or in addition to that of the magister or institor.

The term actiones adjecticiae qualitatis is used by modern commentators on Roman law to denote action by which this kind of liability was enforced, because of the Adjectio or additional clause which was introduced in their formula. By the civil law, as we have noticed, the inferior could not bind the superior, i.e. deteriorate his condition even with the consent of the superior, Savigny, § 113. But the Praetor besides the actio directa (empti, locati, &c.), which lay against the inferior, granted similar actions with a modified formula (actio empti de peculio, &c.) against the superior. They are six in number: Quod jussu, Exercitoria, Institoria, De peculio, De in rem verso, Tributoria. In the formula for De peculio, and De in rem verso (one formula with a double condemnatio), the adjectio was annexed to the condemnatio with a taxatio clause limiting the damages either to the peculium or to the amount of benefit which the defendant had derived from the transaction in question. Keller.

Litis Contestatio, § 50 (cf. Lenel, p. 225), supposes that the following may have been its simplest form : Maevius judex esto. Quod Titius Seio filiofamilias mensam argenteam commodavit, qua de re agitur, quidquid ob eam rem Seium Titio dare facere oportet ex fide bona, ejus judex Gaium patrem, dumtaxat De peculio aut Quod in rem Gaii patris versum est, condemnato. In Quod jussu, Exercitoria, and Institoria, the Adjectio was apparently a part of the demonstratio, something corresponding to a demonstratio being required even where the action was one de certa pecunia or de certa re. Keller suggests the following formula: Quod jussu Gaii patris Seius filiusfamilias a Titio hominem emit, quidquid ob eam rem Seium Titio dare facere oportet ex fide bona, id Gaium patrem condemna. In all of them the agent alone was mentioned in the intentio, § 34 comm., the condemnation being directed against the person of the principal. Cf. Lenel, § 206. We have not sufficient data for determining the nature of the formula in Tributoria. The knowledge of the father, the inadequate distribution, the limitation of liability to the merx peculiaris, would seem to require an Adjectio to all three parts of the formula.

By the combination in one formula of the actions De peculio and De in rem verso, the superior could be successively sued on two grounds. If the actions had been distinct, then, as their intentio must have been identical, Litis Consumptio would have hindered their successive institution.

The agent and principal were correal debtors, at least when the agent was a free person, 3 § 110 comm., and against whichever an action was brought, the intentio averred the debt of the agent, so that on Litis Contestatio against either, the other was discharged by Res in judicium deducta. To remedy the injustice in such cases Justinian enacted that bringing an action against one correal debtor did not consume the right of action against the other. Cod. 8, 40, 28.

The actio de in rem verso, given against the paterfamilias or dominus, if a transaction entered into by a person in their power, though they had not authorized it, turned to their profit (si in rem ejus versum est), is based on the principle of the condictio, as e.g. of the condictio indebiti, that where the property of one person is increased without any adequate legal ground (sine causa) at the expense of another, the latter can claim restitution. The actions de peculio and tributoria, which had the peculium or the merx peculiaris of the son or slave for their object, show that while the peculium of the subordinate members of the family was legally the property of the head, it was recognized by the law for some purposes as if it were the de facto property of the son or slave.

Thus obligations between them and their superior, which were unenforceable by action (obligationes naturales), had to be taken into

account by the judex in the distribution among creditors of the peculium, or of that part of it, which was appropriated to trade.

§ 75. Ex maleficiis filiorum familias seruorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominoue aut litis aestimationem sufferre aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam esse. Inst. 4, 8, pr.

§ 75. For a delict, such as theft or outrage, committed by a son or slave, a noxal action lies against the father or master, who has the option of either paying the damages assessed or surrendering the delinquent. For it is not just that the misdeed of a son or slave should involve the father or master in any detriment beyond the loss of his body.

§ 76. Constitutae sunt autem noxales actiones aut legibus aut edicto praetoris: legibus, uelut furti lege XII tabularum, damni iniuriae lege Aquilia; edicto praetoris, uelut iniuriarum et ui bonorum raptorum. Inst. 4, 8, 4.

§ 76. Noxal actions were introduced partly by statute, partly by the edict of the praetor: by statute, for instance the action for theft by the enactment of the Twelve Tables, and the action for injury to property by the lex Aquilia; by the edict, for instance the action for outrage (injuriarum) and the action for rapine.

§ 77. Omnes autem noxales actiones caput secuntur. nam si filius tuus seruusue noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem peruenerit, cum illo incipit actio esse; si sui iuris coeperit esse, directa actio cum ipso est, et noxae deditio extinguitur. ex diuerso quoque directa actio noxalis esse incipit. nam si pater familias noxam commiserit, et is se in adrogationem tibi dederit aut seruus tuus esse coeperit, ⟨*quod*⟩ quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa fuit. Inst. 4, 8, 5.

§ 77. All noxal actions are said to follow the person of the delinquent. Accordingly if your son or slave has done a wrong while he is in your power, an action lies against you; if he falls under the potestas, patria or dominica, of another person, an action lies against his new superior: if he becomes his own master (sui juris), a direct action lies against the delinquent himself, and the noxal action is extinguished. Conversely, a direct action may change into a noxal one: thus if a paterfamilias has committed a delict, and then has made himself your son by adrogatio or having been a free man has become your slave, as I showed in the first book might happen in certain circumstances, a noxal action lies against you in place of the direct action which formerly lay against the delinquent.

§ 78. Sed si filius patri aut seruus domino noxam commi-

§ 78. But no action lies for an offence by a son or slave

serit, nulla actio nascitur; nulla enim omnino inter me et eum qui in potestate mea est obligatio nasci potest. ideoque etsi in alienam potestatem peruenerit aut sui iuris esse coeperit, neque cum ipso neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus seruus filiusue noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio an quiescat. nostri praeceptores intercidere putant, quia in eum casum deducta sit, in qu*o* consistere non potuerit, ideoque, licet exierit de mea potestate, agere me non posse; diuersae scholae auctores, quamdiu in mea potestate sit, quiesc*e*re actionem putant, qu*ia* ipse mecum agere non possum, cum uero exierit de mea potestate, tunc eam resuscitari. Inst. 4, 8, 6.

committed against his father or master; for between me and a person in my power no obligation is possible; and, consequently, if he passes into the power of another, or becomes his own master (sui juris), neither he himself in the one case nor the person in whose power he now is in the other can be sued. Hence it has been asked whether, if another man's son or slave has wronged me and subsequently passes into my power, the action is in consequence extinguished, or is only in abeyance. Our school maintains that the action is extinguished, because a state of circumstances has arisen in which an action is impossible, and therefore if the delinquent pass again out of my power I have no action. The other school maintains that while he is in my power the action is only in abeyance, because I cannot bring an action against myself, but that it revives when he passes out of my power.

§ 79. Cum autem filius familias ex noxali causa mancipio datur, diuersae scholae auctores putant ter eum mancipio dari debere, qui*a* lege XII tabularum cautum sit, ⟨*ne aliter filius de potestate patris*⟩ exeat, quam si ter fuerit mancipatus; Sabin*us* et Cassius ceterique nostr*ae* scholae auctores sufficere unam mancipationem crediderunt, et illa*s* tres leg*is* XII tabularum ad uoluntarias mancipationes pertinere.

§ 79. When a filiusfamilias is conveyed by mancipation to the injured party in a noxal action, the other school hold that he ought to be mancipated three times, because the law of the Twelve Tables provides that a son cannot pass out of the power of the father unless he is three times mancipated. Sabinus and Cassius and the other authorities of my school hold that a single mancipation is sufficient, and suppose that the three conveyances of the Twelve Tables are only required in voluntary mancipations.

§ 80. Haec ita de his personis quae in potestate ⟨*sunt*⟩, siue ex contra|ctu siue ex *ma*leficio earum —. quod uero ad *ea*s | personas quae in manu mancipioue sunt ⟨—⟩, ita ius dici-

§ 80. So much for the contracts and delicts of persons under the power of a father or master. As to persons subject to manus or mancipium, when they are sued for contracts, unless they are de-

tur, ut cum ex *contr*actu earum ag*a*tur, nisi ab eo cuius iuri subiectae sint in solidum defendantur, bona quae earum f*u*tura forent, si e*ius* iur*i* subiectae non essent, ueneant. sed cum resciss*a* *capitis* *deminutione* *cum* *iis* imperio continent*i* *i*ud*icio* agit*ur*, ——— (13 *uersus in C legi nequeunt*) ——|———|——— XII tabular*um* ——| (7 *uersus in C legi nequeunt*)

fended against the whole damages by the superior to whom they are subject, the goods which would have belonged to them but for their subjection are ordered by the praetor to be sold. But when their change of status is supposed to be rescinded and an action is brought resting on the praetor's executive supremacy (judicium quod imperio continetur). . . .

§ 81. ——— Quid ergo *est*? ——— diximus — non permissum fuerit ei mortuos homines dedere, tamen etsi quis eum dederit qui fato suo uita excesserit, aeque liberat*ur*.

§ 81. But though I said that the surrender of a dead man was not allowed yet if the delinquent died a natural death and the body is surrendered by the person sued on his account in a noxal action, the judgment is satisfied.

§ 77. Gaius explained the various modes by which a man might lose his freedom, 1 § 160. A person who fraudulently allowed himself to be sold with the view of sharing the purchase money, Inst. 1, 3, 4, a freedman ungrateful to his patron, Inst. 1, 16, 1, a woman who persisted in intercourse with a slave without the permission of the master, all forfeited their freedom, the last by a Senatusconsultum Claudianum which was repealed by Justinian, Inst. 3, 12, 1. In the law mentioned by Gaius, l. c., a man who failed to register himself at the census (incensus) lost his freedom; and by the Twelve Tables the fur manifestus and insolvent debtor were assigned (addicti) to the injured party, though, apparently, 3 § 189, not reduced to slavery.

§ 78. Justinian decides in favour of the Sabinians, Inst. 4, 8, 6, that the action for the delict of a slave is extinguished, without possibility of future revival, when the delinquent slave comes into the power of the person aggrieved.

§§ 80, 81. As to the probable contents of the lacuna, cf. Krueger and Studemund's Notes. The death of a delinquent slave before litis contestatio extinguished the liability of the master. The Autun fragments of interpretation of Gaius, which have recently been discovered (see Krueger's Edition of these Fragments in Krueger and Studemund's Gaius, 4th ed., App. p. xl, &c.), contain the following:

Sed interest, utrum serui filiiue nomine noxalis actio propo[*natur an*] animalium; nam si serui filiiue nomine condemnatus fuit do[*minus uel*] pater poe*** in noxam dare etiam mortuum condemn—

noxali actione potest seruum etiam mortuum in noxam dare. [*Et non solum si*] totum corpus det, liberatur, sed etiam si partem aliquam corporis. denique tr[*actatur de*] capillis et unguibus, an partes corporis sint. quidam enim dicunt—— [—]|tationi ———— foris posita animal m[*ortuum*]| dedi non potest.

Quae ratio est, ut serui mortui etiam dedantur? uoluere [——] |—— imponere seruis uel filiis, ut delinquentes semet t[——] | uel potestatem dominorum ***. namque hoc uolebant liberari a dom[——]|uus delinquebat, non poterat dare in usum aut reddere. dabat [——*no*]|xam ————. Ergo cum praetor corpus te dedere dom[——] | parentem putes ———— iure uti t[—— *do*]|mino uel parenti etiam occidere eum et mortuum dedere d[——] | ———— patria potestas potest n[——] | cum patris potestas talis est, ut habeat uitae et necis pot[*estatem*]. De filio hoc tractari crudele est, sed ********* non est **n post r[——|dere, sed est hoc *** iure aut *** quod praebebit lex xii tabularum. sed deferre hoc [——] | debet propter calumniam.

Ergo ideo interest mortuum dedere [—]|ter animalibus nec est * nisi *****ctio** ponis his quae ratione [*carent*].

It would seem from the above that the dead body of a delinquent son or slave, or part of it, might be surrendered in satisfaction to the plaintiff, but not that of an animal which had caused injury to another (pauperies), though it is a question whether the noxal liability would continue if the son or slave were killed by the head of the household in the exercise of the jus vitae necisque. We know that the master of a slave did not escape such liability by his voluntary manumission (on the primitive conception of noxal liability, cf. Holmes, Common Law, chap. I).

As the Romans became more civilized the noxal surrender of a son or daughter by the parent became repugnant to public feelings, and Justinian (Inst. 4, 8, 7) speaks of it as a thing of the past.

Mischief (pauperies) occasioned by an animal might by a law of the Twelve Tables be atoned for by noxae deditio, Inst. 4, 9, and is probably the subject of the lacuna in the text.

§ 82. Nunc admonendi sumus agere nos aut nostro nomine aut alieno, ueluti cognitorio, procuratorio, tutorio, curatorio, cum olim, quo tempore legis actiones in usu fuissent, alieno nomine agere non liceret, pr*aeter*quam ex ce*r*tis causis.

Inst. 4, 10, pr.

§ 82. A man may sue either on his own account or on account of another as his cognitor, procurator, guardian (tutor), or curator, whereas in the days of statute-process a man could only sue on account of another in certain cases.

§ 83. Cognitor autem certis

§ 83. A cognitor for a cause is

uerbis in litem cora*m* aduersario substituitur. nam actor i*ta* cognitore*m* dat QVOD EG*O* A T*E* uerbi gratia FVNDVM PETO, IN EAM REM L. TITIVM TIBI COGNITOREM DO; aduersarius ita QVIA TV A ME FVNDVM PETIS, IN EAM ⟨*REM*⟩ TIBI P. MEVIVM COGNITOREM DO. potest ut actor ita dicat QVOD EGO TECVM AGERE VOLO, IN EAM REM COGNITOREM DO, aduersarius ita QVIA TV MECVM AGERE VIS, IN EAM REM COGNITOREM DO. nec interest, praesens an absens cognitor detur; sed si absens datus fuerit, cognitor ita erit, si cognouerit et susceperit officium cognitoris.

appointed by a set form of words in the presence of the adversary. The form in which the plaintiff appoints a cognitor is the following: 'Whereas I sue you for, say, an estate, in that matter I appoint Lucius Titius as my cognitor;' the defendant thus: 'Whereas you sue me for an estate, in that matter I appoint Publius Maevius as my cognitor.' Or the plaintiff may use the words: 'Whereas I intend to sue you, in that matter I appoint Lucius Titius as my cognitor;' and the defendant these: 'Whereas you intend to sue me, in that matter I appoint Publius Maevius as my cognitor.' It is immaterial whether the person appointed cognitor is present or absent; but if an absent person is appointed, he is only cognitor if he consents and undertakes the office.

§ 84. Procurator uero nullis certis uerbis in litem substituitur, sed ex solo mandato et absente et ignorante aduersario constituitur. quin etiam sunt qui putant eum quoque procuratorem uideri, cui non sit mandatum, si modo bona fide accedat ad negotium et caueat ratam rem dominum habituru*m*; qu*am*qu*am* et ille cui mandatum ⟨*est*⟩ plerumque satisdare debet, quia saepe mandatum initio litis in obscuro e*st* et postea apud iudicem ostenditur.

Inst. 4, 10, 1.

§ 84. A procurator is substituted in a suit for the principal without using any particular form of words, but simply by an informal mandate, and even in the absence and without the knowledge of the other party to the action. According to the opinion of some, a person may even become a procurator without a mandate if he undertakes the office in good faith and engages that the principal will ratify his proceeding. Although he who is acting under a mandate is also as a rule bound to give this security, the fact that he has a mandate being often concealed in the initial stage of the suit, and only coming to light subsequently when the parties are before the judge.

§ 85. Tutores autem et curatores quemadmodum constituantur, primo commentario rettulimus. Inst. 4, 10, 2.

§ 85. How guardians and curators are appointed has been explained in the first book.

§ 86. Qui autem alieno no-

§ 86. He who sues on account

mine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam conuertit. nam si uerbi gratia L. Titius ⟨*pro*⟩ P. Meuio agat, ita formula concipitur SI PARET N. NEGIDIVM P. MEVIO SESTERTIVM X MILIA DARE OPORTERE, IVDEX N. NEGIDIVM L. TITIO SESTERTIVM X MILIA CONDEMN*A*. SI NON PARET, ABSOLV*E*; in rem quoque si agat, intendit P. *ME*VII REM ESSE EX IVRE QVIRITIVM, et condemnationem in suam personam conuertit.

§ 87. Ab aduersarii quoque parte si interueniat aliquis cum quo actio constituitur, intenditur dominum DARE OPORTERE, condemnatio autem in eius persona*m* conuertitur qui iudicium acc*i*p*it*; sed cum in rem agitur, nihil ⟨*in*⟩ intention*e* facit eius persona cum quo agitur, siue suo nomine siue alieno aliquis iudicio interueniat; tantum enim intenditur RE*M* ACTORIS ESSE.

of another names the principal in the intentio and himself in the condemnatio. If, for example, Lucius Titius sues for Publius Mevius, the formula runs thus: 'If it be proved that Numerius Negidius ought to pay to Publius Mevius ten thousand sesterces, do thou, judex, condemn Numerius Negidius to pay to Lucius Titius ten thousand sesterces; if it be not proved, absolve him.' In a real action the thing is affirmed in the intentio to be the property of Publius Mevius by the law of the Quirites, and the representative is named in the condemnatio.

§ 87. When the defendant is represented by a cognitor or procurator in a personal action the principal is named in the intentio, and his representative in the condemnatio. In a real action neither the principal defendant nor his representative is named in the intentio, which only affirms that the thing belongs to the plaintiff.

§ 82. If there is a genuine antithesis between agere suo nomine and alieno nomine, the procuratorium, tutorium, &c., nomen, which is the alienum nomen with which the procurator or guardian sues, must mean the name, not of the procurator or guardian, but of the principal or ward. When a man sues suo nomine he uses his own name in the intentio; therefore it might at first sight be supposed that when a man sues procuratorio nomine he would use the procuratorium nomen in the intentio: the name inserted in the intentio by a procurator is of course however not the name of the procurator but that of the principal, the name of the procurator being only inserted in the condemnatio, § 36. But Gaius is evidently using the word 'agere' here, not for the claim as set out in the intentio, but in a general sense. Statute-process was incapable of representation or procuration (alieno nomine agere), because it could not be modified for this purpose by the praetor; that is to say, it could not as in the formulary procedure frame a condemnatio, in which the procurator's name was substituted for that of the principal.

Justinian enumerates the cases in which representation was permitted in statute-process: Cum olim in usu fuisset alterius nomine agere non posse, nisi pro populo, pro libertate, pro tutela: praeterea lege Hostilia permissum est furti agere eorum nomine, qui apud hostes essent aut rei publicae causa abessent quive in eorum cujus tutela essent. et quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere neque excipere actionem licebat, coeperunt homines per procuratores litigare, Inst. 4, 10, pr. Eam popularem actionem dicimus quae suum jus populo tuetur, Dig. 47, 23, 1. A popularis actio was one brought by a common informer to recover a penalty. The informer enforced, not a private but a public right, that is, sued as the procurator of the people; and therefore an infamis, as he was disabled from being procurator, was incompetent to prosecute in such an action. To public actions and actions by an adsertor libertatis (see 1 § 17, comm.) Justinian adds, as maintainable by a representative under the old jurisprudence, actions on behalf of a ward. We have already mentioned, 1 §§ 142–145, comm., that until the ward attained the age of seven, when he ceased to be infans, the guardian had to bring actions for the ward; after the age of seven the ward maintained his own actions with the sanction of the guardian, though sometimes the latter did so on his behalf.

§ 84. A person who without a mandate undertook the defence of an absent neighbour was called negotiorum gestor (Inst. 3, 27, 1) or defensor, or procurator voluntarius. The employment of a cognitor, from the necessity of appointing him in the presence of the adversary and by a certain formula, was discontinued as inconvenient, and Justinian only speaks of the procurator. Bethmann-Hollweg, vol. 3, appendix 1, quotes from Symmachus the report of a case in which the defendant objected to a procurator (exceptio invalidae procurationis), and the plaintiff proved his appointment by production of a document from the praetor's record office (ex actis praetoriis) at a late stage of judicial proceedings. A procurator thus appointed by protocol was called procurator praesentis, or apud acta factus, and was to some extent in a similar position to that of a cognitor. Keller, Civil Process, § 52.

§ 88. Videamus nunc quibus ex causis is cum quo agitur uel hic qui a*git cogatur* satisdare. Inst. 4, 11, pr.

§ 89. Igitur si uerbi gratia in rem tecum aga*m*, satis mihi dar*e* debes; *ae*quu*m* enim uisum est ⟨*te*⟩ *id*eo quod interea

§ 88. We next inquire under what circumstances the plaintiff or defendant is required to give security.

§ 89. If I sue you in a real action you must give me security. For as you are permitted during the suit to retain possession of a

tibi rem, quae an ad te pertineat dubium *est*, possidere conceditur, cum satisdatione cauere, ut si uictus sis *nec rem* ipsam restituas nec litis aestimationem sufferas, sit mihi potestas aut tecum agendi aut cum sponsoribus tuis. Inst. l. c.

thing to which your title is doubtful, it is fair that you should give me security with sureties so that if judgment goes against you and you refuse to restore the thing or to pay its value I may have the power of proceeding against you or your sponsors.

§ 90. Multoque magis debes satisdare mihi, si alieno nomine iudicium accipias. Inst. l. c.

§ 90. And there is all the more reason that you should give security if you are only undertaking the action as the representative of another.

§ 91. Ceterum cum in rem actio duplex sit, aut enim per formulam petitoriam agit*ur* aut per sponsionem, siquidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur IVDICATVM SOLVI, si uero p*er* sponsionem, illa quae appellatur PRO PRAEDE LITIS ET VINDICIARVM. Inst. l. c.

§ 91. A real action is either commenced by a petitory formula or by a sponsio: if the plaintiff proceeds by petitory formula, recourse is had to the stipulation known as security for satisfaction of judgment; if he proceeds by sponsio, the stipulation employed is known as security for the thing in dispute and for mesne profits.

§ 92. Petitoria autem formula haec est, qua actor intendit REM SVAM ESSE.

§ 92. The Intentio of a petitory formula containing the assertion that the thing belongs to the plaintiff.

§ 93. Per sponsionem uero hoc modo agimus: prouocamus aduersarium tali sponsione SI HOMO QVO DE AGITVR EX IVRE QVIRITIVM MEVS EST, SESTERTIOS XXV NVMOS DARE SPONDES?; deinde formulam edimus; qu*a* intendimus sponsionis summam nobis dar*i* oportere; qua formula ita demum uincimus, si probauerimus rem nostr*am* esse.

§ 93. But in a proceeding by sponsio we challenge the other party to such a wager as follows: 'If the slave in question belongs to me by the law of the Quirites, do you promise to pay me twenty-five sesterces?' and we then deliver a formula in which we sue for the sum named in the wager, but we only obtain judgment by this formula if we prove that the thing belongs to us.

§ 94. Non tamen haec summa sponsionis exigitur. non enim poenalis est, sed praeiudicialis, et propter hoc solum fit, ut per eam de re iudicetur. unde etiam is cum quo agit*ur* non restipulat*ur*. ideo autem appellata est PRO PRAEDE LITIS VINDICIARVM stipulatio, quia

§ 94. But the sum named in the wager in this case is not exacted, for it is not really penal, but prejudicial, and is used merely as a device for instituting a trial of ownership. Hence, the defendant does not enter into a counter stipulation with the plaintiff. But the stipulation in

in locum praedium successit, qui olim, cum lege agebatur, pro lite et *uin*diciis, id est pro re et fructibus, a possessore petitori dabantu*r*.

the place of security for the thing in dispute and for mesne profits (pro praede litis et vindiciarum) is so named because it was substituted for personal sureties (praedes); for in the days of statute-process restitution of the thing in dispute and the mesne profits was secured to the claimant (petitor) by the possessor giving him such sureties.

§ 95. Ceterum si apud centumuiros agitur, summam sponsionis non per formulam petimus, sed per legis actionem; sacramento enim re*um* prouoca*mus*; eaque sponsio sestertium cxxv nummum fi*t scilic*et propter legem Crepere*i*am.

§ 95. When, however, the case is tried in the centumviral court the sum of the wager is not sued for by formula but by statute-process. For then we challenge the defendant by sacramentum, and a sponsio of a hundred and twenty-five sesterces is entered into by virtue of the lex Crepereia.

§ 96. Ipse autem qui in rem agit, si suo nomine agat, satis non dat. Inst. l. c.

§ 96. But if a plaintiff in a real action sues in his own name he gives no security.

§ 97. Ac nec si per cognitorem quidem aga*tur*, *u*lla satisdatio uel ab ipso uel a domino desideratur. cum enim certis et quasi sollemnibus uerbis in locum domini substituatur cognitor, merito domini loco habetur. Inst. l. c.

§ 97. And even if a cognitor sues, no security is required either from him or from his principal, for the cognitor being appointed by a fixed and, as it were, solemn form of words in the place of the principal, he is properly identified with the principal.

§ 98. Procurator uero si agat, satisdare iube*tur* rat*a*m rem dominum habiturum; periculum enim est, ne iterum dominus de eadem re experiatur. quod periculum ⟨*non*⟩ interuenit, si per cognitorem actum fu*er*it, quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet, quam si ipse egerit. Inst. l. c.

§ 98. But if a procurator sues, he is required to give security for the ratification of his proceedings by his principal, as otherwise the principal might sue again on the same claim, which he cannot do after suing by a cognitor on account of the acts of the latter being regarded as his own.

§ 99. Tutores et curatores eo modo quo et procuratores satisdare debere uerba edicti faciunt; sed aliquando illis satisdatio remittitur. Inst. l. c.

§ 99. Guardians (tutores) and curators are required by the edict to give the same security as procurators, but are sometimes excused.

§ 100. Haec ita, si in rem

§ 100. So much for real actions.

agatur; si uero in personam, ab actoris quidem parte quando satisdari debeat quaerentes, eadem repetemus quae diximus in actione qua in rem agitur.

Inst. l. c. 1.

In personal actions the plaintiff is governed by the same rules in respect of giving security as in real actions.

§ 101. Ab eius uero parte cum quo agitur, siquidem alieno nom*ine* aliquis interueniat, omni modo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur. sed siquidem cum cognitore agatur, dominus satisdare iubetur; si uero cum procuratore, ipse procurator. idem et de tutore et de curatore iuris est.

Inst. 4, 11, 1.

§ 101. As regards the defendant, if another person intervenes for him in the action, security must always be given, for no one is considered to be a sufficient defender of another without security; but in a suit against a cognitor it is the principal who gives security, while in a suit against a procurator it is the procurator who gives it; and this same rule applies to guardians and curators.

§ 102. Quodsi proprio nomine aliquis iudiciu*m* accipiat in personam, certis ex causis satisdare solet, quas ipse praetor significat. quarum satisdationum duplex causa est: nam aut propter genus actionis satisdatur, aut pro*pter* persona*m*, quia suspecta sit; propter genus actionis, ueluti iudicati depensiue aut cum de moribus mulieris ag*i*tur; propter personam, ueluti si cum eo agitur qui decoxerit, cuiusue bona ⟨*a*⟩ creditoribus possessa proscriptaue sunt, siue cum eo herede agatur quem praetor suspectum aestimauerit. Inst. l. c.

§ 102. But if a defendant accepts process in his own name in a personal action, he only gives security in certain cases named in the edict. These cases are of two kinds, depending either on the nature of the action or on the suspicious character of the defendant. The nature of the action is the reason in a suit against a judgment debtor, or a principal indebted to his surety, or in an action (for dower) in which the conduct of the wife is in question. The suspicious character of the defendant is the reason if he has already made away with his property, or if his goods have been possessed or proscribed for sale by his creditors, or if an heir is sued whom the praetor looks on as a suspect.

§ 88. In a real action the defendant was required to give security that he would satisfy the judgment (satisdatio judicatum solvi); in a personal, with a few exceptions, if he appeared in his own cause, he was not required. Justinian relieved him of the necessity of giving such security in real actions. But a defendant, whether in a real or personal action, might be compelled either to promise or to give security that he would appear and defend the action till it was concluded (cautio judicio sisti). Inst. 4, 11, 2.

In the time of Gaius, if the defendant in a real action refused to give security judicatum solvi, the possession was transferred from him to the plaintiff by the interdict Quem fundum, Quam hereditatem, or Quem usumfructum, as the case might be, and he was reduced at least for some purposes to the position of plaintiff; cf. Ulp. Inst. Fragm. Vind. in Krueger, Jus Antejus. 2, 159, 'Some interdicts may either initiate or restore possession, as the interdicts Quem fundum and Quam hereditatem. For if I sue a person for land or an heritage, and he refuses to give security, he is compelled to transfer the possession to me whether I never before had possession, or once had and afterwards lost possession'; and Ulpian, Fragmenta Vaticana, 92, 'The plaintiff has a right to security in a real action for a servitude as well as for a corporal thing, and therefore, analogous to the interdict, Quem fundum, there is an interdict, Quem usumfructum, for the transfer of a usufruct'; cf. also Paulus, Receptae Sententiae, 1, 11, 1, 'In a demand of a heritage, security must be given, or else possession is transferred to the demandant. If, however, the demandant refuse to give security, possession remains with the possessor, for in equal circumstances law favours the possessor.' Cf. Lenel, § 248. 2, n. q.

The same principle may perhaps also have applied to Praedial servitudes. If A asserted against B the Urban servitude altius non tollendi (si ageretur, jus vicino non esse, aedes altius tollere), i.e. sought by actio Confessoria of jus altius Non tollendi (with an intentio, perhaps, in the following form: Si paret jus Numerio Negidio non esse aedes altius tollendi invito Aulo Agerio) to restrain B from exercising the indefinite powers of ownership by raising the height of his house, B might decline to defend the action and thus avoid a judicial decision as to the existence of the servitude; but as a penalty for this he would not be allowed afterwards to exercise his alleged right without first proving before a tribunal the nullity of A's claim; proving, that is, either that A never had such a servitude over his house, or that he, B, had extinguished it by acquisition of the counter-servitude (libertatis usucapio). That is to say, being originally in possession, or rather quasi-possession of the jus altius tollendi (for servitudes are not, strictly speaking, subjects of possession), B was deprived of this position; and, if he afterwards wished to exercise his right of building, had first to recover possession of it as plaintiff in a suit: i.e. by actio Negatoria of jus Non altius tollendi, if he denied that A as dominans ever enjoyed such a servitude, or by actio Confessoria of jus altius tollendi, if he claimed as serviens to have reacquired the freedom of his house by usucapio libertatis.

The penalty would only consist in an inversion of the order of proof: B as plaintiff would have to prove his own proprietorship

before A as defendant was put to prove the existence of the servitude: whereas, if A had been plaintiff, A would have had to begin by proving the existence of the servitude before B was put to his answer.

So vice versa: if B had originally wished to prove his right to build as plaintiff, either in an actio Negatoria of jus Non altius tollendi, or in an actio Confessoria of jus altius tollendi; and if A had declined to defend either action by giving securities, &c. in the course prescribed by law; A would have been restrained from afterwards interfering with B except as plaintiff in a suit in which B was made defendant, Dig. 39, 1, 15. Cf. 2, §§ 1–14, §§ 28–39, comm., §§ 1–9, comm.

At a later period, as we have seen, the cautio judicatum solvi was not required from the defendant in a real action, and translatio possessionis might be averted if the defendant merely gave the cautio judicio sisti.

The sum staked in the praedes sacramenti, which Gaius had told us, § 14, was a thousand or five hundred asses, he now, § 95, defines as one hundred and twenty-five sesterces.

The explanation of this is as follows: Originally the sestertius, as the name implies, was two asses and a half, and the denarius ten asses. Both the sestertius and the denarius were silver coins. In the Second Punic War, about B.C. 217, in consequence of the insolvency of the State, the denarius was made equal to sixteen asses and the sestertius remained, as before, one fourth of the denarius, that is, became equal to four asses. One hundred and twenty-five sesterces, therefore, were equal to five hundred asses. This change was brought about by the lex Crepereia.

The Sponsio praejudicialis, though giving rise to a personal action in form, might in effect be a means of deciding a real action. It resembles somewhat the Feigned Issue or issue in a fictitious action on a wager, whereby the Court of Chancery, before it had the power of summoning a jury, might refer an issue of fact to trial by jury, or the parties in a court of law by consent or by direction of some act of parliament might determine some disputed right without the formality of a regular action, thereby saving much time and expense; see Blackstone's Commentaries. In the Sponsio poenalis there was both a sponsio and restipulatio, that is, both parties forfeited the penal sum if they lost the action, and the penal sum might be serious, in an action de pecunia certa credita being one third, and in an action de pecunia constituta being one half of the sum in dispute, § 171.

In the actio Sacramenti in rem and per Sponsionem two different stipulations must be distinguished. In the Sacramentum there was (A) the praedes sacramenti, and (B) the praedes litis et vindiciarum, § 16; in the actio in rem per Sponsionem there was (A) the sponsio praejudicialis, and (B) the satisdatio pro praede litis et vindiciarum.

In the formula petitoria there was only one stipulation, (B) the satisdatio judicatum solvi, corresponding to the second stipulation in the Sacramentum and Sponsio. §§ 91, 93.

In the interdicts Uti possidetis and Utrubi, each party being originally both plaintiff and defendant, there were (A) two sponsiones and two restipulationes for a penal sum, on which stipulations the principal issue was founded: there was no security (B) exactly corresponding to the Pro praede litis et vindiciarum, but the highest bidder at the fructus licitatio must either enter into a fructuaria stipulatio, § 16, which in the event of his failing in the action he must forfeit, besides having by the judicium Cascellianum or Secutorium, or action for giving effect to the main decision, to hand over the possession and mesne profits to the successful party; or as an alternative, if he refuses to enter into the fructuaria stipulatio, he is subject to the judicium fructuarium, by which he is required to give the satisdatio judicatum solvi, §§ 166–169.

§ 101. As a plaintiff's procurator could not bring to trial and consume the plaintiff's right, he had to give cautio rem ratam dominum habiturum: and as a defendant's procurator could not bring to trial the defendant's obligation, he had to give security judicatum solvi.

§ 102. The husband sued for the dower of his divorced wife might retain a portion on various grounds, of which Immorality was one, Ulpian, Fragm., 6, 9, 11. 'Retentions in the restitution of dower are on account of children, immorality, expenditure, donation, articles purloined by the wife. On account of children, if the fault of the wife, or the father in whose power she is, occasioned the divorce. Then a sixth is retained on account of each child, but not more than three sixths altogether. For gross immorality a sixth is retained, for slight immorality an eighth. Only adultery is gross immorality.' (Cf. § 44, comm.)

Besides the forfeiture of vadimonium, fraudulent absconding to avoid the summons to appear was an act of bankruptcy, or motive for missio in possessionem. Praetor ait: Qui fraudationis causa latitabit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo, Dig. 42, 4, 7, 1. 'If a debtor fraudulently abscond, and no sufficient representative defends him, I will order his goods to be possessed and sold.'

A heres might, on cause shown to the praetor, immediately after his entry on the succession, be required by the creditors to give security for the payment of their claims, with the alternative of seizure and sale, though only on the ground of his being unlikely to be able to satisfy them, § 102. But after a lapse of time it was necessary to prove not only poverty, but fraudulent behaviour on the part of the heres, Dig. 42, 5, 31.

The stipulatio judicatum solvi contained three clauses: Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo, Dig. 46, 7, 6. 'The stipulation judicatum solvi is composed of three clauses, for satisfaction of the judgment, for defending the action, and for fraud.' The action must be defended 'to the satisfaction of a reasonable man,' which was interpreted to mean that, if a defensor appeared before the judex, the second clause was not satisfied unless the defensor was prepared to give further security judicatum solvi, Dig. 46, 7, 5, 3. 'A defensor may prevent the stipulation taking effect if he defends "to the satisfaction of an arbitrator," that is, with adequate security.' Cf. Roby, 2. p. 384.

Justinian as a general rule relieved the defendant in any action who appeared in his own person from the first and third clauses of the security judicatum solvi, but not from the second. The vadimonium or cautio judicio sistendi, which originally, it seems, only referred to adjourned appearances in jure, was at this period extended to the judicia, and bound the defendant to appear before the judex and remain to the end of the trial. If, then, in consequence of an adjournment in jure, there had been a vadimonium between the parties, no further stipulation would be necessary; otherwise the defendant would have had to enter into the undertaking that formed the second clause of the stipulation judicatum solvi, Inst. 4, 11, 2. 'This is not the present rule. The defendant now is not required either in a real or personal action, if he appear in person, to give security for satisfaction of the judgment, but only for his own personal presence and continuance in court to the end of the trial.'

The procurator of the plaintiff appointed before the judex or in the record office of the magistrate by memorandum (insinuatio) in the register of his public proceedings (apud acta) was assimilated to the cognitor whom he superseded, and was not required to give security; otherwise he had to give security ratam rem dominum habiturum, because Litis Contestatio by him operated no consumption.

The procurator of the defendant might either have himself to give security, or his principal, as fidejussor of his procurator, gave security judicatum solvi in his place, as in the case of the cognitor, which might include a mortgage (hypotheca) of all his property. A defensor (whether authorized or unauthorized) of the defendant must find security judicatum solvi, because Litis Contestatio by him operated consumption, § 101.

§ 103. Omnia autem iudicia aut legitimo iure consistunt aut imperio continen*tur*.

§ 103. Actions are either statutable or are derived from magisterial power.

§ 104. Legitima sunt iudicia quae in urbe Roma uel int*ra* primum urbis Romae miliarium inter omnes ciues Romanos sub uno iudice accipiuntur; eaque ⟨*e*⟩ lege Iulia iudicia*ria*, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est quod uulgo dici*tur* e lege Iulia litem anno et sex mensibus mor*i*.

§ 104. Statutable actions are those that are instituted within the city of Rome, or within an area limited by the first milestone, between Roman citizens, before a single judex; and these by the lex Julia judiciaria expire in a year and six months from their commencement, unless previously decided; which is the meaning of the saying that by the lex Julia an action dies in eighteen months.

§ 105. Imperio uero continentur recuperatori*a* et quae sub uno iudice accipiuntur interueniente peregrini persona iudicis aut litigatoris. in ea*dem* causa sunt, quaecumque extra primum urbis Romae miliarium tam inter ciues Romanos quam inter peregrinos accipiuntur. ideo autem imperio contineri iudicia dicuntur, quia tamdiu ualent, quamdiu is qui ea praecepit imperium habebit.

§ 105. Magisterial power is the source of those actions that are instituted before recuperators, or before a single judex, if the judex or a party is an alien, or that are instituted beyond the first milestone from Rome, whether the parties are citizens or aliens. They are said to be derived from magisterial power because they can only be prosecuted as long as the praetor who delivered the formula continues in office.

§ 106. Et siquidem imperio continenti iudicio *a*ctum fuerit, siue in rem siue in personam, siue ea formula quae in factum concepta est, siue ea quae in ius habet intentionem, postea nihilo minus ipso iure de eadem re agi potest; et ideo necessaria est exceptio rei iudicatae uel in iudicium deductae.

§ 106. To have sued in an action derived from magisterial power, whether real or personal, and whether it had a formula of fact (in factum) or an allegation of law (in jus), is not by direct operation of law a bar to the institution of a subsequent action on the same question: and therefore a counteractive plea (exceptio) is necessary alleging that the matter has been already decided (res judicata) or that issue has been joined upon it.

§ 107. *S*i uero legitimo iudicio in personam actum sit ea formula quae iuris ciuilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio superuacua est; si uero uel in rem uel in factum actum fuerit, ipso iure nihilo minus postea agi potest, et ob

§ 107. But if a statutable action in personam with an intentio of civil law has been already brought, a subsequent action on the same question cannot by direct operation of law be afterwards maintained, and on this account a counteractive plea is not required. But if a statutable

id exceptio necessaria est rei iudicatae uel in iudicium deductae.

action in rem or a statutable action in personam with an intentio of fact has been brought, a subsequent action on the same question may nevertheless by direct law be maintained, and on this account the counteractive plea that the matter has been already decided, or the plea that there has been a previous joinder of issue on it is necessary.

§ 108. Alia causa fuit olim legis actionum: nam qua de re actum semel erat, de ea postea ipso iure agi non poterat; nec omnino ita, ut nunc, usus erat illis temporibus exceptionum.

§ 108. It was otherwise formerly in the case of statute-process, since in this procedure a subsequent action on a question which had already been the subject of an action was always barred by direct operation of law, nor were counteractive pleas (exceptiones) at all in use in those times, as they are now.

§ 109. Ceterum potest ex lege quidem esse iudicium, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse. nam si uerbi gratia ex lege Aquilia uel Ollinia uel Furia in prouinciis agatur, imperio continebitur iudicium; idemque iuris est et si Romae apud recuperatores agamus, uel apud unum iudicem interueniente peregrini persona; et ex diuerso si ex ea causa, ex qua nobis edicto praetoris datur actio, Romae sub uno iudice inter omnes ciues Romanos accipiatur iudicium, legitimum est.

§ 109. An action may arise from statute (ex lege) and yet not be statutable (legitimum), or statutable and yet not arising from statute. For instance, an action arising from the lex Aquilia, or Ollinia, or Furia, if maintained in the provinces, is derived from the power of the magistrate, and so it is if instituted at Rome before recuperators, or though instituted before a single judex, if the judex or a party is an alien; and, on the contrary, an action given by the edict, if maintained at Rome, before a single judex, between Roman citizens, is statutable (legitimum).

The sum total of the powers of a magistrate, so far as he was charged with the administration of justice, is described by the term Officium jus dicentis. This officium contained two ingredients—jurisdictio (in the narrower sense of the term) and imperium.

Of these two elements, Jurisdictio, which is the essential element of the Officium jus dicentis, denoted the power (perhaps originally vested in the Pontifex) of administering the civil law in the ordinary course of procedure. It consisted chiefly in presiding over the preliminary stages of litigation, and in the period of legis actiones was

summed up in the utterance of the solemn words, Do, Dico, Addico; but in the formulary period it was principally performed, not by oral utterances, but by the delivery of written documents (verbis conceptis). In genuine litigation it was called jurisdictio contentiosa; in fictitious litigation, e.g. manumission by vindicta, alienation by in jure cessio, it was called jurisdictio voluntaria.

Imperium as coupled with the administration of civil justice (imperium quod jurisdictioni cohaeret, Dig. 1, 21, 1, 1), or as including it (cui etiam jurisdictio inest, Dig. 2, 1, 3), was called imperium mixtum, as opposed to imperium merum, or gladii potestas, the administration of criminal justice. Imperium mixtum may be divided into two functions, (1) cognitio extraordinaria and (2) actiones honorariae.

(1) Magistrates invested with imperium had 'the power of issuing commands (jus decernendi) to which they enforced obedience by fine (mulcta), distress (pignus), and imprisonment, and, as a preliminary to issuing a command (decretum), of summoning parties before them (vocatio), by means of a lictor, and conducting in person an investigation of facts (causae cognitio). To these functions of the praetor must be referred Restitutio in integrum, Missio in possessionem, and other proceedings which the praetor decided in person without reference to a judex, a form of procedure which finally embraced all cases, superseding the ordo judiciorum or formulary system.

(2) But even of suits belonging to the ordo judiciorum, which conformed, that is, to the principle of appointing a judex, a portion must be referred to the praetor's imperium. All the new actions, unknown to the civil law, which the praetor invented when executing the powers conferred upon him by the law of uncertain date that introduced the formulary system, the lex Aebutia; such as fictitious actions and actions in factum; in a word, all actiones honorariae, were emanations of the praetorian imperium.

Jurisdictio is sometimes used in a wider sense as equivalent to officium jus dicentis; and then Lex and Jurisdictio form an antithesis similar to that which is formed by Jurisdictio in the narrower sense and Imperium, the antithesis, namely, of Legislator and Administrator.

This antithesis is the principle of many of the divisions or classifications in Roman jurisprudence, and is expressed in various terms. We have legitimum jus opposed to praetorium jus, § 34: legitimum jus opposed to praetoris jurisdictio, § 111: jus civile opposed to jus praetorium or jus honorarium, Dig. 1, 1, 7: actio legitima opposed to actio honoraria, Dig. 35, 2, 32, pr., and Collatio, 2, 5, 5: actio legitima opposed to actio utilis, Dig. 39, 3, 22, 2: actio civilis opposed to actio honoraria (omnes actiones aut civiles

dicuntur aut honorariae), Dig. 44, 7, 25, 2, and Dig. 50, 16, 178, 3: actiones quae ipso jure conpetunt opposed to actiones quae a praetore dantur, § 112: actiones quae ex legitimis et civilibus causis descendunt opposed to actiones quas praetor ex sua jurisdictione comparatas habet, Inst. 4, 6, 3: actio civilis opposed to actio in factum a praetore danda, Dig. 2, 14, 7, 2: actio juris civilis opposed to interdictum, Dig. 43, 26, 14: and lex opposed to praetor (actionum modus vel lege vel per praetorem introductus), Dig. 50, 17, 27.

Although the division into judicia legitima and judicia quae imperio continentur does not exactly coincide with the division into actiones legitimae and actiones honorariae (e.g. an actio in factum, if litigated at Rome before a Roman judex by two Romans, would be judicium legitimum, and, vice versa, an actio civilis, if litigated before recuperators or in the provinces or between aliens, would be judicium quod imperio continetur, § 109), yet it is essentially the same, being based on the same antithesis of the Legislator and the Executive.

§§ 104, 105. Statutory actions (judicia legitima), so named perhaps from the lex Julia judiciaria, the statute by which they were defined, had by that statute a pendency of eighteen months. After that period they could neither be prosecuted nor renewed, as the right of action was consumed by res in judicium deducta. If the delay was caused by the defendant the plaintiff had a remedy by an action De dolo, Dig. 4, 3, 18, 4. Actions binding (continentia) by magisterial power had a still shorter pendency, the commission of the judex only continuing in force so long as the praetor who appointed him, and who himself was only appointed for a year, continued in office.

It is difficult to reconcile this account of the prescription or limitation of legal process with what we read of the duration of some controversies. Martial speaks of a cause that had been litigated in the three Fora, the Forum Romanum, the Forum Julium, and the Forum Augustum, for twenty years:

> Lis te bis decimae numerantem frigora brumae
> Conterit una tribus, Gargiliane, foris.
> Ah miser et demens! viginti litigat annis
> Quisquam cui vinci, Gargiliane, licet? 7, 65.

Bethmann-Hollweg, § 80, suggests that the limitation did not apply to Centumviral suits nor to Cognitio extraordinária; and that any litigation might be protracted by a series of appeals.

This limit to the duration of legal proceedings, though it has left some traces in the Digest, was obsolete long before Justinian. Theodosius limited the pendency of actions to thirty years, Cod. Theod. 4, 14, 1; i.e. he ordained that as the right of action expired

unless Litis contestatio took place within thirty years from the nativity of an action; so, after Litis contestatio, an interval of thirty years after any act of the judge or one of the parties should be a bar to any further prosecution of the action. Justinian limited the duration of civil suits to three years from Litis contestatio, and sanctioned the law against a party who failed to proceed in the action after being ordered to do so by contumacial proceedings (eremodicium, ἔρημος δίκη) against the contumacious plaintiff or defendant, Cod. 3, 1, 13; if both parties agreed to let the litigation lie dormant, he limited the dormancy or pendency to forty years. Bethmann-Hollweg, § 147.

The expiration of the commission of the judex by the expiration of the functions of the praetor who appointed him suggests an analogy to the Common Law previous to 1 Geo. 3, c. 23; by which act judges are continued in their offices notwithstanding any demise of the crown, which was formerly held to vacate their seats.

The division of actions into those with a pendency of eighteen months (judicia legitima) and those which expire with the praetorship (judicia imperio continentia) is not coincident with the division into those which are ipso jure extinctive of future litigation and those which are merely counteractive ope exceptionis, § 106. For although all judicia imperio continentia, whether in jus or in factum, are merely liable to be met by an exception, some judicia legitima, i. e. real actions and actiones honorariae, are not ipso jure extinctive, § 107. Gaius, therefore, would have been guilty of an inaccuracy if, 3 §§ 180, 181, he meant to identify the two divisions, but when he says, l. c. § 181, 'si legitimo judicio debitum petiero, postea de eo ipso jure agere non possim,' he seems only to be speaking of an actio stricti juris for the recovery of a debt, and not to refer in any way to actiones in rem or actiones honorariae.

The reason why real actions and actions in factum had not the same power of Novation as personal actions in jus was probably as follows: Under the legis actiones the same claim could not be the subject of a second trial, being ipso jure consumed or extinguished by having been once sued on; § 108. Nam qua de re actum semel erat, de ea postea ipso jure agi non poterat: nec omnino ita, ut nunc, usus erat illis temporibus exceptionum. After the lex Aebutia, which instituted the formulary procedure, an action in personam with an intentio in jus concepta, e.g. si paret Numerium Negidium Aulo Agerio x H.S. dare oportere, an action on which the parties had joined issue was consumed ipso jure in the same way as actions under the older procedure, provided it was a judicium legitimum, i. e. instituted between Roman citizens before a single judex, and within an area bounded by the first milestone. Proceedings

thus defined, when once issue was joined in them, produced what is called a necessary novation, 3 § 180. Tollitur adhuc obligatio litis contestatione, si modo legitimo judicio fuerit actum: nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione. But this formal rule was not interpreted as applicable to actions in factum, since such actions do not allege in the intentio of their formula any legal claim of the plaintiff, but only a fact; and thus do not formally contain any obligation, which could be the subject of novation; actions in factum indeed were used precisely in those cases, where no right was recognized by the civil law, that is where no right would have been enforceable by statute-process. Nor was the principle of ipso jure consumption applicable to real actions (actiones in rem), as the assertion made in the intentio of such actions, e.g. hunc fundum ex jure Quiritium meum esse, was not made exclusively against a particular defendant, and therefore did not prevent the action being ipso jure maintainable a second time. In Real actions and actions in factum, therefore, even though in other respects they had the characteristics of judicia legitima, the defendant required the protection of the exceptio rei in judicium deductae or rei judicatae. Cf. Keller, Civil Process, § 60.

§ 109. The nature of the lex Ollinia is not known.

The same imperium mixtum whence emanated new actions in favour of the plaintiff also issued exceptions in favour of the defendant, and in particular the exceptio rei in judicium deductae or rei judicatae, which supplemented the novation or consumption whereby a right of action was extinguished or annihilated by direct operation of law (ipso jure, § 106). The aim of the law in barring once-used rights of action directly by consumption or indirectly by exceptio, was to protect a defendant from being harassed by successive suits, and to guard against the public evil which would arise in the shape of a general unsettlement and uncertainty of rights if judicial decisions were not conclusive, Dig. 44, 2, 6. 'That one right of action should only be tried once is a reasonable rule to prevent interminable litigation and the embarrassment of contrary decisions.' Accordingly, it was adopted as a maxim that (in the absence of appeal or after appeal) judicial decisions should be assumed to be true. Res judicata pro veritate accipitur, Dig. 1, 5, 25. The principle may be stated more at length as follows: A judgment shall not be contradicted by a judgment in a subsequent trial between the same parties where the same right is in question (except, of course, by the judgment of a court of appeal). Et generaliter, ut Julianus definit, exceptio rei judicatae obstat quotiens inter easdem personas eadem quaestio revocatur vel alio genere judicii, Dig. 44, 2, 7, 4. 'The plea of previous judgment is a bar when-

ever the same question of right is renewed between the same parties by whatever form of action.' Let us consider more minutely the import of this rule.

The parties must be the same. Cum res inter alios judicatae nullum aliis praejudicium faciant, Dig. 44, 2, 1. 'A judgment between certain parties does not determine the rights of other parties.'

This is subject to certain exceptions. For instance, a judgment is conclusive not only against the parties but also against their successors, whether universal or particular, Cod. 8, 35, 2. A judgment in a suit litigated by the father respecting the status (legitimacy) of a child is conclusive on all the world. A mortgagee, purchaser, husband, are bound by the judgment in a suit about title to the property litigated by the mortgagor, vendor, donor of dower, Dig. 42, 1, 63. A suit between a testamentary heir and the heir by intestacy may bind the legatees and the manumissi who accordingly may be entitled to be made parties and to appeal. In these cases the judex is said to establish jus, i. e. jus inter omnes, not merely jus inter partes: Placet enim ejus rei judicem jus facere, Dig. 25, 3, 3, pr.: Jus facit haec pronuntiatio, Dig. 30, 1, 50, 1.

The form of action is immaterial provided that the same right is contested. Thus a depositor, lender, pledgor, may recover damages for injury to the thing deposited, lent, or pledged, either by action on his contract or under the lex Aquilia, but if cast in one, he cannot bring the other, if the question of liability is really the same. Cf. Grueber, Lex Aquilia, p. 230, &c.

It is otherwise as if the right contested is really different; if in one action a plaintiff claims a jus in rem, in the other a jus in personam. Paulus respondit, ei qui in rem egisset nec tenuisset, postea condicenti non obstare exceptionem rei judicatae, Dig. 44, 2, 31. 'If a plaintiff after losing a real action brings a personal action, he is not barred by the plea of previous judgment.'

The term 'the same right' must be taken to include a right and its correlative duty; in other words, it is immaterial that the position of plaintiff and defendant is inverted. Si quis rem a non domino emerit, mox petente domino absolutus sit, deinde possessionem amiserit et a domino petierit, adversus exceptionem, 'Si non ejus sit res,' replicatione hac adjuvabitur: 'At si res judicata non sit,' Dig. 44, 2, 24. 'A purchaser of a thing from a non-proprietor, sued for it by the true proprietor and acquitted, afterwards losing possession thereof, and seeking (by actio Publiciana, 2 § 43) to recover it from the former proprietor, may meet the exception by which he pleads true dominion by the replication of previous judgment.' This example further shows that the plea, though invented chiefly to protect defendants, is sometimes available for plaintiffs.

When the same right is in question it is immaterial that the secondary object (2 § 1, comm.) of the right is different. Thus, a plaintiff claiming to be heir, who fails when he brings hereditatis petitio for Blackacre, cannot afterwards bring hereditatis petitio for Whiteacre as a part of the same inheritance. Of course, if there is no question of hereditas, the difference in the object involves a different right of Ownership: and the Vindicatio by which a man claims Blackacre is not barred by a previous Vindicatio in which he claimed Whiteacre.

Perhaps the same right may be in question even when the primary object, the benefit which the right immediately contemplates, is different. Thus, a plaintiff who fails in a condictio furtiva brought to recover stolen property, cannot afterwards maintain an actio furti to recover a penalty for theft. We might say that the plaintiff has a single compound right to recover his property and to recover a penalty, but perhaps it is more accurate to say that he has two separate rights which, however, stand or fall together by necessary implication. The identity of the right contested is more expressly insisted on in the legal maxim, De eadem re ne bis sit actio, which grounded the exceptio rei in judicium deductae, founded on the novation of the plaintiff's original right by Litis contestatio. The maxim, Res judicata pro veritate accipitur, grounds the exceptio rei judicatae, which rests on the novation of Litis contestatio by Condemnatio or Absolutio, 3 § 180; post litem contestatam condemnari oportere, post condemnationem judicatum facere oportere. The two exceptions were substantially the same, and were pleaded in the formula by the same terms: Quod ea res in judicium ante venisset, cf. Lenel, tit. xliv, § 275. The maxim, Res judicata pro veritate accipitur, is the more comprehensive as extending beyond the right to the facts constituting the title and their logical consequences. Bethmann-Hollweg, § 111.

It is immaterial, namely, whether a proposition was decided as the final question, or as an essential element and immediate ground of the final decision (ratio decidendi). Every judgment is a decision not only on the ultimate issue, but by implication on all the antecedent pleas, not only the exception, replication, duplication (which are not a direct answer to the claim of the plaintiff or defendant, being only counteractive, § 115), but also on all facts, e. g. solutio, acceptilatio, novatio, which run counter to the claim of the plaintiff in the intentio and so would not be expressed in a Roman formula. Thus, a plaintiff who fails when he sues by real action for a particular thing, or by a personal action for a debt, basing his claim on the presupposition of his succession to a person deceased, cannot afterwards claim the whole succession by hereditatis petitio. Hence we often meet with praescriptio praejudicialis, e. g. Ea res agatur si in ea

re praejudicium hereditati non fiat, § 133, or exceptio praejudicialis, e. g. extra quam si in reum capitis praejudicium fiat, Cic. de Inventione, 2, 20; i. e. dilatory pleas whereby a party seeks to postpone a less important issue (causa minor) until a more important issue (causa major) with which it is indissolubly connected shall have been decided. This praescriptio implies that if the more important issue were decided on possibly inadequate examination, as incidental or ancillary to the decision of the minor issue, the re-trial of the more important issue would be barred by the exceptio rei judicatae.

Observe that the rule is, a judgment shall not be contradicted by a judgment in another action when the same right is in question, not, when the same title is in question. The latter expression would be sufficient to meet the case of personal actions. Here every different obligation is ground to support a different action, and every different title engenders a different obligation. Thus a plaintiff who fails in an action on tort alleging Dolus is not precluded from a subsequent action on tort alleging Culpa, Dig. 40, 12, 13. But the rule so stated would not adequately meet the case of real actions. Here it is immaterial that the plaintiff alleges a different title. There can be many obligations between the same parties in respect of the same subject; but the same subject only admits of one owner, and consequently of only one valid title to ownership. Hence the plaintiff in a real action was required to adduce all his fancied titles on pain of being barred by the exception of res judicata, and if, for instance, he claims ownership on the ground of tradition he cannot afterwards claim by another title, e. g. usucapion, § 131 *a*. A man who fails in a claim as testamentary heir may, however, afterwards claim as heir by descent, Dig. 5, 3, 8: he has as many actions (hereditatis petitio) as he has delations: in fact the legacies and the arbitrary division of the succession between the co-heirs make a testamentary inheritance quite a different right (alia res) from an intestate inheritance. (So Ihering, § 51. But cf. Savigny, § 300.) The rule, of course, does not apply to a title not in existence at the time of the former action (causa superveniens), and it is defeated if the plaintiff takes the precaution expressly to limit the former action (probably by means of a praescriptio) to the investigation of a specific title, a limitation called causae adjectio. If he was allowed by the praetor to do this and failed in his suit, he could afterwards claim to be owner by a different title. Si quis petat fundum suum esse eo, quod Titius eum sibi tradiderit, si postea alia ex causa petat causa adjecta, non debet summoveri exceptione, Dig. 44, 2, 11, 2. 'A plaintiff who loses an action in which he claimed property in land on the ground of delivery of possession, is not barred by exception from bringing another real action, expressly limited, like the former, to a specific title.'

Directly extinctive (ipso jure) consumption of a right of action vanished with the formulary system, and in Justinian's time the averment of Res judicata is only found under the form of Exceptio or a Counteractive plea. Indeed, when the judex of the republican period ceased to be commissioned to hear and determine causes, one of the conditions of Judicium legitimum, of which such consumption was a consequence (unus judex, § 107), was always of necessity wanting.

But this was not the only change: the consumption of a right of action by the operation of Res in judicium deducta, whether as a directly extinctive (ipso jure) or a counteractive plea (ope exceptionis); in other words, necessary Novation operated by Litis contestatio, was also abrogated and is not to be found in the statute-book of Justinian. Even the operation of Res judicata, so far as it was governed by the same rules as Res in judicium deducta and merely indicated by its name a later stage of the proceedings (sententia lata), may also be said to have been abolished. The rules, that is to say, which governed the transformed Exceptio rei judicatae, as it prevailed in the time of Justinian, were much more rational and flexible than the hard-and-fast doctrine of Necessary novation, whether by Litis contestatio or by Sententia lata, which prevailed in the time of Statute-process, § 108, and apparently survived to the days of Gaius. In determining whether the exceptio rei judicatae should be allowed to put a stop to the maintenance of a new action, the judge in Justinian's time would have to consider whether the second action raised the same question between the same parties as the first action; in other words, whether the reasons why the plaintiff's first action was dismissed were still applicable in the case of the second action. If they were, the exceptio would prevail, if not, if e.g. the plaintiff's first action had been dismissed in consequence of Plus petitio or some dilatory plea or by consumption of process (duration of suit for eighteen months, or termination of praetorship), he was no longer held to have eternally forfeited his claim: but suitors were merely restrained, in accordance with the real object of the institution, from harassing their opponents with renewed litigation on the precise questions that had once been adequately decided. The operation of the plea was not less powerful nor less extensive, but made more completely conformable to equity. Savigny, §§ 280–301.

§ 110. Quo loco admonendi sumus eas quidem actiones quae ex lege senatusué consultis proficiscuntur perpetuo solere praetorem accommodare, eas uero quae ex propria ipsius iuris-

§ 110. Here we ought to take notice that actions founded on a statute (lex) or a senatusconsultum are granted by the praetor after any length of time has elapsed, but those founded on the

dictione pendent plerum|que intra annum dare.

Inst. 4, 12, pr.

§ 111. Aliquando tamen——| imitatur ius legitimum: quales sunt eae, quas bonorum possessoribus ceterisque qui heredis loco sunt accommodat. furti quoque manifesti actio, quamuis ex ipsius praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit.

Inst. l. c.

§ 112. Non omnes actiones, quae in aliquem aut ipso iure conpetunt aut a praetore dantur, etiam in heredem aeque conpetunt aut dari solent. est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec conpetere nec dari solere, ueluti furti, ui bonorum raptorum, iniuriarum, damni iniuriae. sed heredibus huius modi actiones conpetunt nec denegantur, excepta iniuriarum actione et si qua alia similis inueniatur actio.

Inst. 4, 12. 1.

§ 113. Aliquando tamen ⟨*etiam*⟩ ex contractu actio neque heredi neque in heredem conpetit; nam adstipulatoris heres non habet actionem, et sponsoris et fidepromissoris heres non tenetur. Inst. l. c.

praetor's own jurisdiction are usually only granted within a year from their having arisen.

§ 111. But sometimes the praetor follows the pattern of civil law and makes his actions perpetual; such are the actions which he grants to the praetorian successor (bonorum possessor) and to other persons who are in the position of an heir (heres) (§ 35). So for theft detected in the commission (furti manifesti), the action, though praetorian, is perpetual; and properly so, the pecuniary penalty having been instituted in the place of capital punishment.

§ 112. It is not always the case that the actions, whether civil or praetorian, which lie against a man lie also against his heir, the rule being absolute that penal actions arising from delict, for instance, from theft (actio furti), rapine (vi bonorum raptorum), outrage (injuriarum), unlawful damage (damni injuriae), are not granted against the heir of the delinquent; but the heirs of the injured party are competent to bring, and are not refused, these actions, except in the case of the action for outrage and any similar action if such is to be found.

§ 113. Sometimes, however, even an action upon contract cannot be brought by the heir, nor against the heir; for the heir of the adstipulator has no action, nor does any lie against the heir of the sponsor or fidepromissor.

§ 110. Having considered what time may elapse between joinder of issue in an action (litis contestatio) and its termination (sententia lata), Gaius proceeds to inquire what time may elapse between the nativity of a right of action or the event which marks the first moment of the right of action (actio nata) and the exercise of this right or actual commencement of the action. Thus he is here taking notice of the subject which we call the Limitation of actions.

Originally all civil actions (actiones civiles) were unlimited in duration (actiones perpetuae); afterwards the praetors limited in their edicts the right of bringing most of the new actions which they introduced (actiones praetoriae) to the period of a year from the date of the event on which the action was founded 'infra annum judicium dabo.' The aediles limited their actions on account of sale to a still shorter period, viz. to six or twelve months of dies utiles. But the praetorian actions which were framed after the pattern of the civil law were, as we see by the text, § 111, like the civil actions they copied, unlimited, while on the other hand some few civil actions were subject to a limitation, as the Querela Inofficiosi Testamenti, which had to be brought within five years. Those actions which could be brought after any time had elapsed were called on this account actiones perpetuae, as opposed to actiones temporales, which were actions limited in respect of duration. At some uncertain period a limitation was introduced by the provincial governors in suits relating to land, known as praescriptio longi temporis: if plaintiff and defendant were domiciled in the same province, ten years' possession, accompanied with justus titulus and bona fides on the part of the possessor, entitled the defendant to plead the exceptio temporis, and so to defeat the action of the owner for recovery of possession: twenty years' possession was required if plaintiff and defendant were domiciled in different provinces. In later times, indeed, as we noticed when we were dealing with the subject of usucapion, such possession constituted not simply a limitation of the owner's action, that is, afforded a good defence against his action, but operated like usucapion; that is, transferred the ownership to the possessor. Constantine introduced a forty years' limitation of a real action or prescription: that is, ordained that an owner should lose his right of action after forty years' possession, Cod. 7, 39, 2, pr. The emperors Honorius and Theodosius II, A. D. 424, made all actions, not otherwise limited, subject to a limitation of thirty or in some exceptional cases forty years, so that from this time actio perpetua no longer meant an action which was unlimited, but one which could be maintained at any time within this long period. See 2 §§ 40–61, comm., 4 § 131, comm.

Justinian made longi temporis praescriptio, or possessio, that is, continuous possession for ten or twenty years, subject to the conditions of usucapion, the universal mode of acquiring ownership in land by operation of time; and added a second form called longissimi temporis praescriptio, Cod. 7, 39, 8. But we are only concerned with praescriptio here in its original form as a limitation of the owner's right of action; as a mode of acquiring ownership it belongs to another part of this treatise. And even as a limitation

of action such prescription has this peculiarity, that it cannot be pleaded generally, but only by a defendant, who has been in possession of the property in question for the prescribed period. Thus being a defence founded on possession, and not simply on the owner's omission to bring his action, it comes to a great extent under the category of substantive law.

Longi temporis praescriptio was applicable as a defence not only to actions of an owner claiming possession of his property, but also to those relating to the existence of a servitude, and though a lex Scribonia is said to have done away with the usucapion of servitudes, in later imperial law praescriptio became a mode of acquiring servitudes, as it was of acquiring ownership. In the thirteenth century the canon law required as a condition both of acquisitive and of extinctive prescription, in all cases brought for restitution of possession, continued bona fides (not merely bona fides in the inception, as the civil law required for usucapion) on the part of the possessor. This principle applied to the defendant in all real actions and in various personal actions, viz. commodati, depositi, locati, pigneraticia, the latter being the action whereby a person who had given over his property in pledge to his creditors sued on the contract for its restitution. Accordingly, by canon law, the debitor rei alienae, e. g. rei commodatae, as opposed to the debitor rei propriae, e. g. pecuniae creditae, had neither the right of acquisitive nor of extinctive prescription in the absence of continued bona fides. Savigny, § 244.

In every limitation of an action or prescription, whether of longer or shorter duration, two points have to be fixed: the moment at which the time of prescription begins to run and the moment at which it is terminated. I proceed to the consideration of this problem.

The date of the Nativity of a right of action (actio nata), or the moment from which prescription begins to run, is in Real actions the moment when a Real right is violated; e.g. the moment when the defendant takes unpermitted possession of a thing of which the plaintiff is proprietor; or when a hirer or borrower converts detention into possession by beginning to possess in his own name and not in the name of the proprietor.

In Personal action on delict prescription begins to run from the moment of the delict; for at this moment the sanctioning right of the plaintiff to recover the penalty is complete.

Similarly in Quasi-contracts: prescription of tutelae judicium begins to run from the end of the guardianship when the tutor's default is established: that of condictio indebiti from the date of the mistaken payment.

In actions on Contract, according to most writers including Savigny, prescription similarly begins to run from the moment at

which the contract is violated, i.e. from the inception of the creditor's sanctioning right. According to Vangerow, § 147, the running of prescription does not always wait for the violation of the creditor's primary right, or a breach of the contract by the debtor. If a term for performance is fixed, then indeed prescription will begin to run from the expiration of the term, i.e. from the violation of the plaintiff's primary right, Cod. 7, 39, 7, 4: but whenever no term is prefixed, prescription begins not, as Savigny holds, from the creditor's demand of performance, but from the completion of the contract; i.e. contemporaneously with the origin of the primary right. It precedes any violation of the plaintiff's right, unless we assume (what is absurd) that the default of instantaneous performance is such a violation. Savigny, § 240.

Savigny would except from the rule those contracts which, like mutuum, depositum, commodatum and the like, essentially and in their nature contemplate a certain delay in performance. In such contracts he holds that prescription begins not from the completion of the contract, but from the demand of performance.

It seems paradoxical to maintain that for the purposes of prescription the right of action precedes the existence of a wrong: but Vangerow's doctrine seems to be confirmed by the Digest: Est ... scriptum eum qui rem deposuit, statim posse depositi actione agere: hoc enim ipso dolo facere eum qui suscepit, quod reposcenti rem non reddat, Dig. 16, 3, 1, 22; from which it appears that the action is equivalent to a demand. Similarly we read in the Institutes of Justinian, 3, 15, 2 [Ex stipulatione pura] confestim peti potest. Indeed it would be strange, as Vangerow observes, if the neglect of a creditor or his successor to demand repayment for 100 years adjourned the inception of prescription for all that period. Cf. Windscheid, 1 § 107, n. 5.

It is clear that the Nativity of an action is not to be identified with Mora, but will often be an earlier occurrence. Mora, which in respect of interest and liability for loss is attended with serious consequences to a defendant (whereas praescriptio is adverse to the plaintiff), does not arise before one of two events; either the expiration of the term prefixed for payment, or the debtor's refusal to comply with the creditor's demand, 2 § 280, comm. The demand of the creditor is necessary to disprove the presumption that the delay of payment was by his indulgence: no such condition, according to Vangerow's doctrine, delays the nativity of a right of action.

The other limit of Prescription, or the event by which it is broken (interruptio), is any recognition of a right by the defendant or the institution of a suit by the plaintiff. The institution of a suit was in earlier times identified with Litis contestatio: but in the latest period, as this stage of procedure could be delayed by the

arts of the defendant, it was necessary to fix some other point, with which this and the other effects of Litis contestatio should be connected. Savigny, § 278. Accordingly Citation, awarded by the judge in response to the libellus of the plaintiff and served upon the defendant (insinuatio, conventio) by a public officer, was deemed to be the moment at which an action commences, and prescription is interrupted, or usucapion is revocable. Interruptio per conventionem introducta, Cod. 7, 39, 7, 5. Qui obnoxium suum in judicium clamaverit et libellum conventionis ei transmiserit . . . . videri jus suum omne eum in judicium deduxisse et esse interrupta temporum curricula, Cod. 7, 40, 3.

The opinion of Savigny that prescription in later Roman law was interrupted or put a stop to in all actions alike by Citation is the generally received one, though Vangerow and others maintain that this only applies to actiones perpetuae, not to actiones temporales, the old rule as to litis contestatio still surviving according to them in respect of the latter. Savigny refuses to accept such limitation, and explains (§ 242, III) how this erroneous view (as he considers it) arose. The passages from the older writers mentioning litis contestatio in this connexion all refer to actiones temporales, for the simple reason that none other were prescriptible in the classical law, but it does not follow that this difference between the two kinds of action was maintained, when all actions became prescriptible; indeed, if there was to be any difference, the interruption of actiones temporales ought to have been made easier than that of actiones perpetuae, and not, as according to Vangerow's view it would be, more difficult. The two passages in the Digest which seem to support Vangerow, Dig. 12, 2, 9, 3, Dig. 27, 7, 8, 1, the compilers forgot to alter, so as to bring them into accordance with existing law. (Windscheid, 1 § 108, n. 4.)

We must distinguish between the interruption and the mere suspension, dormancy, or stay, of prescription. When prescription is interrupted (for instance, by acknowledgment of the debt) the already elapsed period of inactivity on the part of the plaintiff is cancelled, and the whole prescription must recommence from the date of the interruption. When prescription is suspended, if such suspension takes place after prescription has begun to run, the period which has elapsed is not invalidated but is added to the period which follows the removal of the obstacle which caused the suspension. Suspension, as expressed in the modern maxim: Agere non valenti non currit praescriptio, is produced by some inability of the plaintiff to sue: but this rule is not generally applicable, when the action can be carried on by an agent, as in the case of a lunatic; though suspension is produced by the party entitled being impubes

or by his minority, except in the prescription of thirty years: it is also produced by the obstacles recognized in the rules of tempus utile, 2 § 165, comm., and by the beneficium deliberandi accorded to the heir, 2 § 162, comm. By the ordinance de tigno injuncto in the Twelve Tables the right of the co-owner of building materials to sue for them was suspended so long as they formed part of a building, Inst. 2, 1, 7, 10.

Exception had sometimes a stronger, sometimes a weaker, operation: the stronger effect is the extinction of both civilis and naturalis obligatio. Such is the effect of the exceptio Sc. Vellaeani, 3 §§ 110–127, comm. The weaker operation is a bar to civilis obligatio, but leaves naturalis obligatio unimpeded and is instanced by exceptio Sc. Macedoniani, 3 §§ 90, 91, comm. Naturalis obligatio, as we have already mentioned, 3 §§ 88, 89, comm., besides the negative feature that it is not a ground to support an action may have other important consequences: it excludes indebiti condictio in the event of payment by mistake, and it may be a ground to support compensatio, novatio, pignus, fidejussio, constitutum. Let us examine whether prescription or Exceptio temporalis had the weaker or the stronger operation.

We must distinguish between Real and Personal actions.

The effect of the mere limitation of a real action (e. g. vindicatio) is that the right of the original owner continues, but is not ground to support an action against the possessor or his successor. If the thing passes into the possession of a stranger, then the original owner can recover it from him by vindicatio: and if it comes by lawful means into the possession of the original owner, the former possessor cannot recover it from him by vindicatio, Cod. 7, 39, 8, 1. In the event of bona fides there could under the law of Justinian after thirty or forty years be no question of mere limitation; because then, as we have seen, the very jus of the original owner would have been extinguished. In real actions, then, limitation does not entirely deprive the owner of his right, though here of course there is no obligatio naturalis.

The effect of prescription or limitation in personal actions is controverted. Savigny holds that the stronger effect is confined to exceptions founded on jus naturale; and that prescription being, as shown by its arbitrary numerical character, an institution of jus civile, can only have the weaker operation, i. e. leaves untouched the obligatio naturalis, § 249. Vangerow, however, seems to show conclusively, § 151, that this doctrine is not tenable. Many passages of the Digest show that in temporal actions prescription of right to sue had the stronger operation, excluding fidejussio, Dig. 46, 1, 37, and constitutum, Dig. 13, 5, 18, 1, that is not regarding a prescribed debt as a subsisting debt for the purpose of being secured by way of suretyship, though if it had been a natural obligation, it could have

been thus secured, and admitting condictio indebiti, Dig. 46, 8, 25, that is if a prescribed debt was paid to the creditor by mistake, the debtor could claim repayment, which if a natural obligation remained after the time of limitation had passed, he could not have done: and there is no reason why its operation should not be equally strong in perpetual actions. Indeed the very object of prescription, the setting of some limit to the duration of uncertainty, would be defeated if a creditor were allowed to enforce by Compensation a claim that for an indefinite period he had not attempted to enforce by action. Prescription, then, in all personal actions has the stronger operation. (English law seems to differ, at least so far as it recognizes a debt made irrecoverable by the statute of limitations as a sufficient consideration to give legal force to the debtor's promise to pay: for, in the absence of all legal obligation, a mere moral obligation would admittedly not suffice to bind the debtor before the tribunals. Also a lien, or right to detain goods till a debt is satisfied, exists after the remedy by action is barred by the Statute of Limitations.)

Has prescription the same effect upon the grounds of defence (Exceptions) that it has upon the grounds of attack (Actions): can there be temporis Replicatio as well as temporis Exceptio? This depends upon the nature of the exception. In the case of some exceptions there are corresponding actions, which other exceptions are without. An instance of the latter class is the exceptio rei judicatae when judgment in a vindicatio is given in favour of the possessor. This merely denies the right of the plaintiff without affirming the right of the defendant, and therefore cannot be used by the defendant as a ground of action: but it may be employed by the defendant as a means of defence against the plaintiff or his successor after any lapse of years.

An instance of exception having a corresponding action is exceptio metus, which belongs to a defendant who may, if he chooses, be a plaintiff in an actio quod metus causa. So, too, there is the exceptio doli and the actio doli.

Savigny holds, § 249, that such exceptions are imprescriptible; but the better opinion seems to be that they have the same duration as the right of action (in the words of the French jurists: Tant dure l'action, tant dure l'exception): for the reason alleged for making exceptions imprescriptible: Is cum quo agitur non habet potestatem quando conveniatur, Dig. 44, 4, 5, 6, the inability of the person armed with the exception to fix when the matter shall be litigated, is inapplicable when the same person is also armed with a right of action. Vangerow, l. c.

§ 111. The rules prescribed by the praetor for the duration of actions seem to have been as follows; purely restorative or remedial

actions (quae rei persecutionem habent) i.e. actions where there is neither gain for the plaintiff nor loss for the defendant, but the patrimony of each is left at its original level, § 7, are generally speaking perpetual; that is to say, according to the change in the law made subsequently to the time of Gaius, are prescribed in thirty years. Cf. Dig. 44, 7, 35 In honorariis actionibus sic esse definiendum Cassius ait, ut quae rei persecutionem habeant, hae etiam post annum darentur, ceterae intra annum. Honorariae autem, quae post annum non dantur, nec in heredem dandae sunt, ut tamen lucrum ei extorqueatur, sicut fit in actione doli et interdicto unde vi et similibus. Penal actions given by the praetor (quibus poenam persequimur), using the word in a wide sense to include both those actions, where there is no gain to the plaintiff but possibly a loss to the defendant, as well as those where if judgment passes for the plaintiff there is enrichment for the plaintiff and impoverishment for the defendant, are annual. But the actio furti manifesti, though a praetorian action, was perpetual, for the reason given by Gaius in § 111.

The actio rerum amotarum, being brought for the purpose of restitution, was perpetual. Cf. Dig. 35, 2, 21, 5 Haec actio licet ex delicto nascatur, tamen rei persecutionem continet et ideo non anno finitur, sicut et condictio furtiva.

The actio doli mali, if brought for complete indemnification, was annual: but if the damages were limited to the amount gained by the defendant, in which case the action was rei persecutoria, it was perpetual, Dig. 4, 3, 28.

When a right of action was limited to a year, this was an annus utilis, that is, a year of dies utiles, of days open to jurisdiction, and on which the plaintiff was not hindered by any insurmountable obstacle, such as absence of plaintiff or defendant, illness of plaintiff and inability to appoint a procurator, Dig. 44, 3, 1. An annus utilis, though nominally a year, might really be a much longer period. Where a right of action lasted beyond a year, every day was counted (tempus continuum), 2 § 173. From the indefinite duration of annus utilis it is clear that the suggestion, Inst. 4, 12, pr., of a connexion between the annus of prescription and the annus of the praetorship is purely fanciful.

§ 112. The transmission of an action to the heirs of the parties is either active transmission, i.e. transmission to the heir of the party having a right of action, or passive transmission, i.e. transmission of liability to the heir of the party subject to an action.

The general rule relating to transmission is, that all actions are transmissible, both actively, that is, to the heirs of the party having a right of action, and passively, that is, to the heirs of the party subject to an action.

The exceptions are that (1) as to active transmission Vindictive actions (of which the type is actio injuriarum), i. e. actions brought to avenge wrong to the feelings rather than to repair wrong to the property, are not transmitted to the heirs of the party having a right of action; and that (2) as to passive transmission, delictal actions are only transmitted against the heirs of the party subject to an action so far as the inheritance has been enriched by his wrong.

But condictio furtiva lies against the heres of the defendant for the whole amount of loss caused by the furtum, which some writers explain by saying that, although this action is occasioned by delict, it is not deemed to be delictal or penal, but purely restorative (rei persecutoria). Condictio furtiva, however, is not only occasioned by delict, but gives rise to penal consequences, should the damages exceed the amount of profit which the defendant has derived from the delict. The fact that these penal consequences attach not only to the fur himself but also to his heir can only be regarded as an anomaly, whether we look on the action as a delictal one, or as a species of condictio sine causa. Cf. Dernburg, Pand. 3 § 139, Windscheid, Pand. 2 § 453.

Penal actions, either when their object is reparation for the injury or when it is the recovery of a penalty, when once brought, that is, when they have once reached the stage of litis contestatio, become capable of both active and passive transmission: Poenales autem actiones, si ab ipsis principalibus personis fuerint contestatae, et heredibus dantur et contra heredes transeunt, Inst. 4, 12, 1. In modern systems of law based on the Roman, the heir is as a rule liable on account of the delicts of the deceased to the extent of the property to which he has succeeded, and not simply for the amount the inheritance has been enriched by the wrong.

English law was made, as we have seen, by statute, more favourable than Roman law to the plaintiff in actions ex delicto in respect of the passive transmission of the remedy.

The executors of a testator and administrators of an intestate have the same remedy for injury to the personal property of the deceased as he would have had in his lifetime, 4 Edw. III, c. 7; 25 Edw. III, st. 5, c. 5.

For an injury committed against his real property within six months of his death, they may bring an action within one year after his death. And for an injury to either real or personal property committed within six months before the death of the wrong-doer, an action may be brought against his executors or administrators within six months after they have taken on themselves administration, 3 & 4 Will. IV, c. 42. (Cf. Pollock, Law of Torts, pp. 59, 60, 4th ed.)

Under Justinian, when the Adstipulator, Sponsor, and Fidepromissor had disappeared, all actions founded on contract were

passively transmissible in solidum against the heirs of the defendant; and it was apparently a mere inadvertence of Tribonian to repeat, Inst. 4, 12, 1, the words of Gaius, § 113, which contemplate the possibility that an action founded on contract should be incapable of passive transmission. (For another explanation of this passage see the note to it in Moyle's Inst.)

§ 114. Superest ut d*i*spiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciat actori, quid officio iudicis conueniat, utrum absoluere, an ideo potius damnare, quia iudicii accipiendi tempore in ea causa fuerit, ut damnari debeat. nostri praeceptores absoluere eum debere existimant, nec interess*e* cuius generis *s*it iudicium; et hoc est quod uulgo dicitur Sabino et Cassio placere omni|a iudicia absolutoria esse. ——|— de bonae fide*i* iudiciis autem idem sentiunt, quia in eiusmo|di iudiciis liberum est officium iudicis. tantumdem | e*t* de *in* rem actionibus putant, quia *formulae uer*|*b*is id i*psum* expri*matur*——|———|quibus——| — petentur et ad ——|— *inter*dum enim ——|———|———| —— sunt etia*m* | in personam tales actiones in quibus *expri*mit*ur* —|———| actori qu——| ———|———| paratus ad actoris ——|———|———|actum fuerit. Inst. 4, 12, 2.

§ 114. We next inquire whether, if the defendant before judgment, but after the parties have joined issue, satisfies the plaintiff, the judex has power to absolve him, or must condemn him, because he was liable to condemnation when the formula was delivered. The authorities of my school hold that he should be absolved without distinction of the kind of action; and hence the common saying that according to Sabinus and Cassius all actions involve free power of absolution. The other school agree in respect of actions bonae fidei, where the judex has more discretion, and of real actions because there is an express provision to this effect in the terms of the formula: (as also in respect of actiones arbitrariae in personam, since they likewise contain an express provision in their formula that the judex is not to condemn if the defendant satisfies the plaintiff; but not in respect of actions stricti juris).

§ 114. Respecting the power of the judex to absolve the defendant in the above circumstances, Justinian confirmed the opinion of the Sabinians, Inst. 4, 12, 2.

The principle, Omnia judicia esse absolutoria, indicates an exception to the effects of Litis contestatio. The motive of the effects ascribed to Litis contestatio is in general to avert from the plaintiff the injurious consequences of the protracted duration of a trial. Accordingly if judgment passed in his favour he was put into the position he would have occupied if judgment had immediately

followed on Litis contestatio. If this rule had been universal no event supervening on Litis contestatio could have extinguished the plaintiff's right to have judgment in his favour, which in some cases would have been unjust to the defendant, but the free discretion given to the judex by the formula of a bonae fidei action enabled him to take into account any circumstances arising after joinder of issue which would entitle the defendant to absolution, if admissible.

In actions stricti juris it seems at first to have been held that what would have been an adequate ground for the extinction of the plaintiff's claim if it had happened before Litis contestatio, e. g. the purely casual destruction of the subject of litigation, was ineffectual to save the defendant from condemnation if it happened after Litis contestatio. Finally, however, the doctrine prevailed that, in the absence of Mora, such an event was effectual for the absolution of the defendant, even when it occurred after Litis contestatio. See 3 § 180, comm.

In real actions, where the condemnation or absolution of the defendant was left to the arbitrium of the judge, as in the formula petitoria, the purely casual destruction of an object in the hands of a bona fide possessor, even when it happened after joinder of issue, produced the absolution of the defendant, on the ground that impossibilium non est obligatio. It is to be observed, however, that the circumstances arising subsequent to Litis contestatio effectual for the absolution of the defendant in a real action are limited to those which destroy the Obligation engendered by Litis contestatio. The defendant, that is to say, is subject to condemnation in damages in spite of his having acquired the plaintiff's property by usucapion completed after Litis contestatio (for, as we have seen, usucapion was not interrupted by Litis contestatio), in spite of the extinction of the plaintiff's servitude by non-usus completed after the same date, in spite similarly of casual destruction of the subject in his hands, he being mala fide possessor or after mora, and in spite of destruction by his culpa, he being bona fide possessor.

Subject to this limitation, the rule was universal: omnia judicia esse absolutoria: i. e. all classes of action, real as well as personal, stricti juris as well as bonae fidei, whatever the original right of the plaintiff, *may* terminate by a judgment in favour of the defendant in consequence of some event (casual destruction of the subject, voluntary restitution by the defendant, &c.) subsequent to Litis contestatio. Cf. Vangerow, § 160.

The words in the text 'quia formulae verbis id ipsum exprimatur' refer to the direction to the judex in the formula petitoria not to condemn the defendant if he restores the thing, which is the object of the action, to the plaintiff. Compare what has been stated respecting actiones Arbitrariae, § 47, comm.

§ 115. Sequitur ut de exceptionibus dispiciamus.

Inst. 4, 13, pr.

§ 116. Conparatae sunt autem exceptiones defendendorum *e*orum gratia cum quibus agitur. saepe enim accidit, ut quis iure ciuili teneatur, sed iniquum sit eum iudicio condemnari.

Inst. l. c.

§ 116 *a*. Veluti ⟨*si*⟩ stipulatus sim *a* te pecuniam tamquam credendi causa numeraturus, nec numerauerim; nam eam pecuniam a te peti posse certum est, dare enim te oport*et*, cum ex stipulatu teneris; sed quia iniquum est te eo nomine condemnari, placet p*er* exceptionem doli mali te defendi debere. Inst. 4, 13, 1.

§ 116 *b*. Item si pactus fuero tecum, ne id qu*od* mihi debeas a te *p*etam, nihilo minus [id ipsum] a te petere possum dar*i* mihi oportere, quia obligatio pacto conuento non tollitur; sed placet debere me petentem p*er* exceptionem pacti conuenti repelli. Inst. 4, 13, 3.

§ 117. In his quoque actionibus quae ⟨*non*⟩ in persona*m* sunt exceptiones locum habent. ueluti si metu me co*e*geris aut dolo induxeris, ut tibi rem aliqua*m* mancipio d*arem*; na*m* s*i* eam rem a me petas, datur mihi exceptio, p*er* quam, si metus causa te fecisse uel dolo malo arguero, repelleris.

§ 117 *a*. Item si fundum litigiosum sciens *a* non possi-

§ 115. We have next to examine the nature of Exceptions.

§ 116. Exceptions have been established for the protection of the defendant, as it is often the case that a person is under a liability by the civil law when justice forbids his condemnation.

§ 116 *a*. If, for instance, I have stipulated that you shall pay me a sum of money, on account of my advancing you the money, and then never advanced it, I can certainly sue you for the money, as by civil law you ought to pay, being bound by the stipulation; but it would be iniquitous that you should be condemned on this account, and therefore it is established that you may defend yourself against my claim by the exception of Fraud (doli).

§ 116 *b*. Or if I informally agree not to sue you for a debt you owe me, my right to assert in the intentio of the formula that you are bound to pay me nevertheless continues unimpaired, because a mere pact cannot extinguish a civil obligation, but it is held that my action would be defeated by the exception of pact or agreement between the parties.

§ 117. Actions which are not exclusively maintainable against one definite person also admit of exceptions; for instance, if by threats of violence or by fraud you compelled or induced me to convey the ownership of a thing to you by mancipation, and you sue me for it by vindication, I am granted an exception of intimidation or fraud, which, if I prove, I defeat your claim.

§ 117 *a*. Or if you knew land was an object of litigation, and

dente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omni modo summoueris.

bought it of a person not in possession, when you claim it of a person in possession you are entirely defeated by means of an exception.

§ 118. Exceptiones autem alias in edicto praetor habet propositas, alias causa cognita accommodat. quae omnes uel ex legibus uel ex his quae legis uicem optinent, substantiam capiunt, uel ex iurisdictione praetoris proditae sunt. Inst. 4, 13, 7.

§ 118. Some exceptions are published by the praetor in his edict, while others are granted by him after taking special cognizance of the case, while all are either founded on statute or on what is equivalent to statute, or on the praetor's jurisdiction.

§ 119. Omnes autem exceptiones in contrarium concipiuntur, qu*am* adfirmat is cum quo agitur. nam si uerbi gratia reus dolo malo aliquid actorem facere dicat, qui forte pecuniam petit quam non numerauit, sic exceptio concipitur SI IN EA RE NIHIL DOLO MALO A. AGERII FACTVM SIT NEQVE FIAT: item si dica*t* contra pactionem pecuniam peti, ita concipitur exceptio SI INTER A. AGERIVM ET N. NEGIDIVM NON CONVENIT, NE EA PECVNIA PETERETVR; et denique in ceteris causis similiter concipi solet; ideo scilicet qu*ia* omn*is* exceptio obi*c*itur quidem a reo, sed ita formulae inserit*ur*, ut condicionalem faciat condemnationem, id est ne aliter iudex eum cum quo agitur condemnet, quam si nihil in ea re qua de agitur dolo actoris factum sit; item ne aliter iudex eum condemnet, quam si nullum pactum conuen*tum* *d*e non petenda pecunia factum *fu*erit.

§ 119. But all exceptions take the form of a supposition contrary to what the defendant affirms; if, for example, the defendant imputes fraud to the plaintiff in that he sues for money which he never advanced, the exception is thus expressed: 'If in that matter there was and is no fraud of Aulus Agerius.' Again, if he allege an informal agreement not to claim the money, the exception is thus formulated: 'If Aulus Agerius and Numerius Negidius did not agree that the money should not be demanded;' and so in other cases. For every exception is an objection alleged by the defendant, but is so inserted in the formula as to make the condemnation conditional; that is, the judex is instructed not to condemn the defendant unless there has been no fraud of the plaintiff in this transaction, or unless there has been no informal agreement not to sue for the money.

§ 120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae. Inst. 4, 13, 8.

§ 120. Exceptions are either peremptory or dilatory.

§ 121. Peremptoriae sunt quae perpetuo ualent nec euitari possunt, ueluti quod metus causa

§ 121. Peremptory exceptions are such as are always available and cannot be avoided by post-

aut dolo malo, aut quod contra legem senatusue consultum factum est, aut quod res iudicata est uel in iudicium deducta est, item pacti conuenti quod factum est, ne omnino pecunia peteretur. Inst. 4, 13, 9.

poning the action, as the exception of intimidation, or of fraud, or that there has been a contravention of the statute (lex) or of the senatusconsultum, or that the case has been previously decided (exceptio rei judicatae), or brought to trial (exceptio rei in judicium deductae), or that there has been a formless agreement not to sue for the debt (exceptio pacti conventi).

§ 122. Dilatoriae sunt exceptiones quae ad tempus ualent, ueluti illius pacti conuenti quod factum est uerbi gratia, ne intra quinquennium peteretur; finito *enim* eo tempore non habet locum exceptio. cui similis exceptio est litis diuiduae et rei residuae. nam si quis partem rei petierit et intra eiusdem praeturam reliquam partem petat, hac exceptione summouetur quae appellatur litis diuiduae; item si is, qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios iudices eant, si intra eiusdem praeturam de his quas distulerit, agat, per hanc exceptionem quae appellatur rei residuae summouetur. Inst. 4, 13, 10.

§ 122. Dilatory exceptions are such as merely avail the defendant for a time, such as exception of informal agreement that a debt shall not be sued for within five years, for at the end of five years the exception ceases to be pleadable. Of a similar nature is the exception of divided claim or of the claims left over (litis dividuae et rei residuae). Thus after suing for part of a debt if a man sue for the remainder in the same praetorship, he is barred by this exception (litis dividuae). Or, when a man who has several claims against the same defendant brings some actions and postpones others in order to come before new judices, if within the same praetorship he bring any of the postponed actions, he is met by the exception of claim left over (rei residuae).

§ 123. Obseruandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem; alioquin si obiecta exceptione egerit, rem perdit; non enim post illud tempus, quo integra re ⟨*eam*⟩ euitare poterat, adhuc ei potestas agendi superest re in iudicium deducta et per exceptionem perempta. Inst. l. c.

§ 123. A plaintiff liable to a dilatory exception should be careful to postpone his action, for if he brings his action and the exception is opposed to it, this is fatal to his claim; for as this has been brought to trial and extinguished by the exception being opposed to it, he has lost his right to sue on it, even after the time has elapsed when if the matter had been res integra he would have escaped from being met by the exception.

§ 124. Non solum autem ex tempore, *sed* etiam ex persona dilatoriae exceptiones intelleguntur, quales sunt cognitoriae: ueluti si is qui per edictum cognitorem dare non potest per cognitorem agat, uel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere. nam si obiciatur exceptio cognitoria, si ipse talis er*it*, ut ei non liceat cognitorem dare, ipse agere potest; si uero cognitori non liceat cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et tam hoc quam illo modo euitare ⟨*potest*⟩ exceptionem; quodsi dissimulauerit *ea*m et per cognitorem egerit, rem perdit.

Inst. 4, 13, 11.

§ 124. An exception is considered to be dilatory not only in respect of time but also on personal grounds, such as those which relate to the office of cognitor; for instance, if a person sues by means of a cognitor who is disabled by the edict from appointing one, or if he is able to appoint a cognitor, but appoints some one who is not allowed to serve the office. If the exception to a cognitor (exceptio cognitoria) is pleaded, the principal disabled from appointing a cognitor can himself carry on the action on his own account, or if one person is disabled from acting as cognitor, the principal can carry on the action by employing another, or by suing on his own account, and in either way avoid the exception; but if he disregard the matter and continues to carry on the action by the cognitor, he loses his cause.

§ 125. Se*d* peremptoria quidem exceptione si reus per errore*m* non fu*er*it usus, in integrum restituitur adiciendae exceptionis gratia; dilatoria uero si non fu*er*it usus, an in integrum restitu*a*tur, quaeritur.

§ 125. If a peremptory exception be inadvertently omitted by the defendant, the mistake is set right by the remedy of in integrum restitutio, the defendant being thus allowed to add the exception to the formula; but whether the same is true of a dilatory exception is a matter of controversy.

§ 126. Interdum euenit, ut exceptio, quae prima facie iusta uideatur, inique noceat actori. quod cum accidat, alia adiectione opus est adiuuandi actoris gratia; quae adiectio replicatio uocatur, quia per eam replicatur atque resoluitur uis exceptionis. nam si uerbi gratia pactus sum tecum, ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et, si agam tecum, excipias tu, ut ita demum mihi

§ 126. Sometimes an exception, which in the absence of counter allegations seems prima facie to be just to the defendant, is unjust to the plaintiff, and then, to protect the plaintiff, the praetor adds to the instructions a clause called Replication, because it is an undoing and counteraction of the force of the exception. If, for instance, after we informally came to a contrary agreement that I should not sue you for a debt, we agreed that I might be allowed to sue, and then, when I sue you, you plead the

condemneris, SI NON CONVENERIT, NE EAM PECVNIAM PETEREM, nocet mihi exceptio pacti conuenti; namque nihilo minus hoc uerum manet, etiamsi postea in contrarium pacti sumus; sed q*ui*a iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto hoc modo SI NON POSTEA CONVENIT, VT MIHI EAM PECVNIAM PETERE LICERET. Inst. 4, 14, pr.

informal agreement that you should only be condemned in case there has been no agreement that I should not sue, such exception stands in the way of my claim, for the fact of the first agreement remains true, although we subsequently came to a contrary agreement; but, as it would be unjust that I should be defeated by the exception, I am allowed to reply by pleading the subsequent agreement, thus: 'If there was no subsequent agreement that I might sue for that money.'

§ 126 *a*. Item si argentarius pretium rei quae in auctionem uenerit persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res quam emerit, tradita est; et e*st* iusta exceptio; sed si in auctione praedictum est, ne ant*e* emptori ⟨*res*⟩ traderetur, quam si pretium soluerit, replicatione tali argentarius adiuuatur AVT SI PRAEDICTVM EST, NE ALITER EMPTORI RES TRADERETVR, QVAM SI PRETIVM EMPTOR SOLVERIT.

§ 126 *a*. So if a banker sue for the price of goods sold by auction, he may be met by the exception that the purchaser is only to be condemned in the action if the thing which he has bought has been delivered, and this is prima facie a just exception. But if it was a condition of the sale, that the goods should not be delivered to the purchaser before payment of the purchase-money, the banker is permitted to insert the Replicatio: 'or if it was a condition of the sale that the goods should not be delivered till the price was paid.'

§ 127. Interdum autem euenit, ut rursus replicatio, quae prima facie iusta sit, inique reo noceat. quod cum accidat, adiectione opus est adiuuandi rei gratia, quae duplicatio uocatur. Inst. 4, 14, 1.

§ 127. But sometimes a Replicatio, though prima facie just, unjustly injures the defendant; and then, to protect the defendant, a clause has to be added called Duplicatio (Rejoinder).

§ 128. Et si rursus ea prima facie iusta uideatur, sed propter aliquam causa*m* inique actori noceat, rursus *a*diectione opus est qua actor adiuuetur, qu*ae* dicitur triplicatio. Inst. 4, 14, 3.

§ 128. And again, if this, though prima facie just, on some ground or other unjustly injures the plaintiff, for his protection another clause in addition is required called Triplicatio (surrejoinder).

§ 129. Quarum omnium adiectionum usum interdum etiam

§ 129. And sometimes further additions are required by the

ulterius quam diximus uarietas negotiorum introduxit.

multiplicity of circumstances by which dispositions may be successively or contemporaneously affected (Rebutter and Surrebutter).

§ 130. Videamus etiam de praescriptionibus quae receptae sunt pro actore.

§ 130. We next proceed to notice the Praescriptio, a clause designed for the protection of the plaintiff.

§ 131. Saepe enim ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est: ueluti cum in singulos annos uel menses certam pecuniam stipulati fuerimus; n*am* finitis quibusdam annis aut mensibus huius quidem temporis pecuniam praestari oportet, futurorum autem annorum sane quidem obligatio contracta intellegitur, praestatio uero adhuc nulla est. si ergo uelimus id quidem quod praestari oportet petere et in iudicium deducere, futuram uero obligationis praestationem in integro relinquere, necesse est ut cum hac praescriptione agamus EA RES AGATVR CVIVS REI DIES FV*I*T; alioquin si sine hac praescriptione egerimus, ea scilicet formula qua incertum petimus, cuius intentio his uerbis concepta est QVIDQVID PARET N. NEGIDIVM A. AGERIO DARE FACERE OPORTERE, totam obligationem, id est etiam futuram in hoc iudicium deducimus, et quae ante te*m*|pus obligat*io* ——|——|.

§ 131. For it often happens that one and the same obligation obliges a person to render some performance to us now and some performance at a future time. For example, when we have stipulated for an annual or monthly payment of a certain amount of money, at the end of a year or month there is an obligation to make to us a corresponding payment of money for this time; but in respect of future years, although an obligation is held to have been contracted, no payment has yet become due. If, then, we wish to claim what is at present due, and to bring the matter to trial, at the same time leaving the claim to future performance of the obligation untouched, we must, in bringing the action, employ this Praescriptio: 'Let the action relate exclusively to what is now due.' Otherwise, if we sue without this Praescriptio, the indefinite Intentio, 'Whatever it be proved that Numerius Negidius ought to convey to or perform for Aulus Agerius,' brings our whole right to future as well as to present payment before the judex, and, whatever payment may be due in future, we only recover what is due at the time of joinder of issue, and are barred from any subsequent action on account of the remainder.

§ 131 *a*. Item si uerbi gratia

§ 131 *a*. So again if we sue

ex empto agamus, *ut* nobis fundus mancipio detur, debemus *hoc modo* praescribere EA RES AGATVR DE FVNDO MANCIPANDO, ut postea, si ueli|mus uacuam possessionem nobis tradi, *trad—|———|— sumus, totius illius iuris obligatio illa incer|ta actione QVIDQVID OB EAM REM N. NEGIDIVM A. AGERIO DARE FACERE OPORTET, *per* in*ten*tione*m* consumitur, ut postea nobis agere uolentibus de uacua possessione tradenda nulla supersit actio.

upon a contract of purchase (actio ex empto) for the conveyance of land by mancipation, we must prefix the Praescriptio, 'Let the action relate exclusively to the mancipation of the land,' in order that subsequently, when we wish vacant possession of the land to be delivered to us, we may be able to sue again on the contract of purchase for delivery of possession; as, without this Praescriptio, all our right under that contract is included in the uncertain Intentio, 'Whatever on that ground Numerius Negidius ought to convey to or perform for Aulus Agerius,' and is exhausted by the joinder of issue in the first action; so that afterwards, when we want to sue for the delivery of vacant possession, we have no right of action remaining.

§ 132. Praescriptiones *autem* appellatas esse ab eo, quod *a*nte formulas praescrib*u*ntur, plus quam manifestum est.

§ 132. The Praescriptio is so named because it precedes the formula, as hardly needs to be stated.

§ 133. S*ed* his quidem temporibus, sicut supra quoque notauimus, omnes praescriptiones ab actore proficiscuntur. olim autem quaedam et pro reo opponebantur, qualis illa erat praescriptio EA RES AGATVR, *SI IN EA RE* PRAEIVDICIVM HEREDITATI NON FIAT, quae nunc in speciem exceptionis deducta est et locum habet, cum petitor hereditatis alio genere iudicii praeiudicium hereditati faciat, ueluti | cum singulas res pet*at*; est enim iniquum *per* unius *rei*—
(25 *uersus in C legi nequeunt*)
————|.

§ 133. At present, as we previously noticed, all praescriptions are initiated by the plaintiff; though formerly some used to be put in as a plea of defence by the defendant, for instance, the Praescriptio, 'Let this question be tried if it does not prejudice the question of inheritance,' which clause is now transformed into an exceptio, and is employed when the claimant of an inheritance brings another action which prejudges the right to the inheritance; as, for instance, if he sues for particular things belonging to the inheritance; for it would be unjust [to make the decision of an action respecting an entire inheritance a mere corollary of a decision respecting a less important issue].

§ 134. —*inten*tione formulae

§ 134. If an action is brought

det—*m* est, cui dar*i* oporte*at*; et sane domino dar*i* oportet quod seruus stipulatur; at in praescriptione de *f*acto quaeritur, quod secundu*m* naturalem significationem uerum esse debet.

on a stipulation made by a slave, the intention names the person entitled to recover, that is, the master; while the prescription gives the true history of the facts relating to the contract.

§ 135. Quaecumque autem diximus de seruis, eadem de ceteris quoque personis quae nostro iuri subiectae sunt dicta intellegemus.

§ 135. What has been said of slaves applies to all persons subject to the power of another.

§ 136. Item admonendi sumus, si cum ipso agamus qui incertum p*ro*miserit, ita nobis formulam esse propositam, ut praescriptio inserta sit formul*ae* loco demonstrationis hoc modo IVDEX ESTO. QVOD A. AGERIVS DE N. NEGIDIO INCERTV*M* STIPV*LATVS EST*, CVIVS REI DIES FVIT, QVI*D*QVID OB EAM REM N. NEGIDIVM A. *AGERIO* DARE FACERE OPORTET et reliqu*a*.

§ 136. We must further remark, that when a person who has promised something uncertain in amount is sued, the formula should contain a Praescriptio in place of a Demonstratio, thus: 'Let C D be judex. Whereas Aulus Agerius stipulated for something uncertain from Numerius Negidius, PAYMENT FOR WHICH IS DUE AT PRESENT, whatever payment in respect of this matter Numerius Negidius ought to make over to or perform for Aulus Agerius, &c.'

§ 137. Si cum sponsore aut fideiussore *agatur*, praescribi solet in persona quidem sponsoris hoc modo EA RES AG*A*TVR, QV*OD* A. AGERIVS DE L. TITIO INCERTVM STIPVLATVS EST, QVO NOMINE N. NEGIDIVS SPONSOR EST, CVIVS REI DIES FVIT, in persona uero fideiussoris EA RES AGATV*R*, QVOD N. NEGIDIVS PRO L. *TI*TIO INCERTVM FIDE SVA ESSE IVSSIT, CVIVS *REI DIES* FVIT; deinde formula subicitur.

§ 137. When a sponsor or fidejussor is sued, in the case of the sponsor the common form of Praescriptio is as follows: 'LET THIS BE THE SUBJECT OF THE ACTION that Aulus Agerius has stipulated for something of uncertain amount from Lucius Titius, of which stipulation Numerius Negidius was sponsor IN RESPECT OF THE AMOUNT EXCLUSIVELY ON ACCOUNT OF WHICH PERFORMANCE IS NOW DUE;' in the case of a fidejussor: 'LET THE SUBJECT OF THE ACTION be this that Numerius Negidius has guaranteed as fidejussor for Lucius Titius something of uncertain amount, IN RESPECT OF THAT EXCLUSIVELY WHICH CAN NOW BE CLAIMED;' and then follows the rest of the formula.

An explanation of the nature of Exceptions requires to be based on a review of the general incidents of litigation.

In every action there is some contention, allegation, or averment of a plaintiff which is met or encountered by some contention, allegation, or averment of a defendant.

The contention of the plaintiff contained in the intentio is the assertion of some right of the plaintiff: e. g. in a vindicatio or real action, the assertion of dominion or jus in re (si paret illam rem Auli Agerii esse): in a personal action, the assertion of an obligation or jus in personam (si paret Numerium Negidium Aulo Agerio illam rem dare oportere). In an action with a formula in factum concepta there is an implicit or indirect assertion of a right, although explicitly and directly the intentio only asserts the fact which forms the title on which such right is founded. In the wording of the formula the right of the plaintiff appears as an hypothesis; because the formula or instruction to the judex is a hypothetical command, expressed in a sentence of which the intentio forms the antecedent or protasis, and the condemnatio the consequent or apodosis.

The contention of the defendant is either

(A) a NEGATION of the alleged right of the plaintiff, or

(B) an affirmation of a COLLIDING, countervailing right of the defendant whereby the alleged right of the plaintiff is counterpoised and counteracted.

The denial of the plaintiff's right again admits of division:

1. It is either a simple and absolute negation of the plaintiff's right: an assertion of its non-existence even in the past: an affirmation of its original nullity; or

2. A qualified or relative negation. Admitting or assuming that it once existed, it is a negation of its present existence: an affirmation of its subsequent destruction, nullification, or avoidance.

Accordingly a defendant had three lines of defence:

I. The assertion of the original NULLITY of the plaintiff's right.

This might be either a denial (traverse) of the fact, whether a disposition or a trespass, on which the plaintiff's right was alleged to be founded (general issue of English law).

Or the denial of the law by which such a right was said to be annexed to such a fact (demurrer of English law). The question whether in the formulary system a pure issue of law was decided by the praetor in jure (denegatio actionis, when the demurrer was sustained; datio actionis, when it was overruled) without reference to a judex, is immaterial to our present purpose, which is merely an exhaustive view of the various modes of defence open to a defendant.

Or it might be an admission of the fact alleged, with an allegation

of a further fact whereby the efficacy of the admitted fact to found a right was avoided. E. g. the averment of the infancy or lunacy of a party to a disposition (confession and avoidance of English law, producing a plea in justification).

II. The averment of a subsequent nullification or EXTINCTION of the plaintiff's right, admitted to have previously existed (confession and avoidance, i. e. confession not only of a fact, as above, but of a right, with an averment of its subsequent abolition, producing a plea in discharge), e. g. the averment of solutio, acceptilatio, novatio.

III. The objection of a colliding right of the defendant, whereby the right of the plaintiff is not avoided or extinguished but counterworked or restrained from operation: e. g. resistance to an alleged right of a stipulator by putting forward as a counter right that the money in consideration of which the stipulation had been entered into had not been paid, or that the defendant had acquired by informal agreement the right of not being sued on the stipulation (confession of a fact or right and, not avoidance but, COUNTERACTION). This third mode of defence is called Exceptio. Accordingly exceptio may be rendered a Counteractive or obstructive, as opposed to a Negative or destructive, plea.

The allegation of an exceptio does not preclude the defendant from contesting the intentio: Non utique existimatur confiteri de intentione adversarii quocum agitur, quia exceptione utitur, Dig. 44, 1, 9, and the intentio must be proved by the plaintiff before the defendant is called upon to prove the exceptio, Cod. 8, 35, 9: so that, instead of *confession* and counteraction, the exception should be described as a supposition or assumption and counteraction of the plaintiff's right.

1. Examples of the first line of defence are, in a real action, the negation of the traditio on which a plaintiff founds his claim of ownership: in a personal action, negation of the contract or delict on which the plaintiff founds his claim of obligation: in either real or personal action, avoidance of the title alleged by the plaintiff by allegation of the incapacity, as e. g. the lunacy of an alienor or contractor. In hereditatis petitio, the original nullity of a will is pleaded, or the plaintiff's testamentary title is avoided, by averment of the preterition by the testator of a suus heres. A title by contract may be avoided by indicating a limitation in respect of time or place or condition or alternative.

In general the grounds of the original nullity of a disposition are either:

(*a*) Want of the conditions necessary to its validity, whether from absence of the personal qualities required in the disposer, or from absence of the intention which is of the essence of a disposition

or of any other of the essentialia negotii, or from absence of the prescribed form in which an intention is required to be declared.

(*b*) Or prohibition of the disposition by positive law.

The antagonism of the law to a particular kind of disposition might express itself in various ways:

(1) It might prohibit a disposition, but if it was entered into and carried out in a particular way neither rescind it nor impose a penalty on account of the prohibition being disregarded. Such a law is perhaps what Ulpian, 1, 1, denominates an imperfecta lex: it is exemplified by lex Cincia, B. C. 204, which prohibited gifts above a certain amount.

(2) It might prohibit a disposition but, instead of declaring it invalid, impose a penalty on the person by whom it was enforced. This was the method of lex Furia testamentaria, which imposes a fourfold penalty on those who take a legacy above a certain sum, and which Ulpian, l. c., quotes as an example of minus quam perfecta lex, 2 § 225, comm.

(3) It might prohibit a disposition but only strike it with a partial invalidity: allowing it to create a valid right, but making such right subject to be deprived of its efficacy by Exceptio. Such an exceptio might be of the weaker class, only barring obligatio civilis, e. g. exceptio Sc. Macedoniani, 3 §§ 90-91, comm.; or of the stronger class, barring both civilis and naturalis obligatio; e. g. exceptio Sc. Vellaeani, 3 §§ 110-127, comm.

(4) It might declare the prohibited disposition to be entirely invalid. Such an ordinance is called by Ulpian perfecta lex, and is exemplified in lex Falcidia, 2 § 227.

Informality, e. g. omission to institute or disinherit suus heres, mancipation without the required number of witnesses, donation without record (insinuatio), produces Nullification.

The second of these paths of prohibition ceased to be trodden after an interpretative law of Theodosius II, A. D. 439. A law prohibiting municipal senators (curiales) from the management (procuratio) of other persons' estates had been evaded by means of simulated leases (conductio), Cod. 4, 65, 30. In consequence of this, Theodosius enacted, in substance, that any prohibitive law, even though it contained no express terms of nullification, should be interpreted to be lex perfecta; and that any simulated dispositions, whereby a law was attempted to be evaded, should be null and void: Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt, lege contrahere prohibente. Quod ad omnes etiam legum interpretationes tam veteres quam novellas trahi generaliter imperamus, ut legis latori, quod fieri non vult, tantum prohibuisse sufficiat, cetera quasi expressa ex legis

liceat voluntate colligere: hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur, licet legis lator fieri prohibuerit tantum nec specialiter dixerit inutile esse debere quod factum est. Sed et si quid fuerit subsecutum ex eo vel ob id, quod interdicente lege factum est, illud quoque cassum atque inutile esse praecipimus, Cod. 1, 14, 5. So in English law a contract is by implication forbidden and void, when a statute, without saying that the contract shall be void, inflicts a penalty on the maker; for a penalty implies a prohibition. Pollock, Contract, p. 293, 7th ed. In some cases statutes prohibited transactions of a particular kind without however expressly declaring them void. In such cases the transaction was not ipso jure void, but the person sued on it could plead an exceptio founded on the statute. Thus the Sc. Macedonianum and Sc. Vellaeanum render the dispositions which contravene them liable to Exceptio, which is inconsistent with nullification.

2. Examples of the second line of defence are in real action the averment of a subsequent loss of ownership by dereliction or usucapion or alienation, or loss of servitus by non-usus: in hereditatis petitio the avoidance of a valid will by agnatio postumi or by the execution of a later will: in personal action the extinction of a debt by solutio, acceptilatio (formal release), novatio.

In general, the avoidance of a right may either be produced by the very disposition by which the right is originated, viz. by the fulfilment of a resolutive condition which it contains: or by something external, e. g. by judgment, when res judicata operates not as a counteractive but as an extinctive plea, 3 § 180: or by a contrary disposition, e. g. dereliction of property, repudiation of the delatio of legatum or hereditas. In respect of contrary dispositions the general rule obtains that to produce complete invalidity the second disposition must be of similar form to the first; otherwise it only produces incomplete invalidity (exceptio, a counteractive plea): Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur, Dig. 50, 17, 35. Thus, a stipulation is extinguished by a formal release (acceptilatio), but only counteracted by an informal release (pactum de non petendo). Furtum and injuria were extinguished by nudum pactum, in spite of the dissimilarity of disposition and tort: offence and reconciliation, as Kuntze observes, § 632, being regarded as contraries. Quaedam actiones per pactum ipso jure tolluntur, ut injuriarum, item furti, Dig. 2, 14, 17, 1. An informal release followed by an informal revocation (pactum de petendo) is not extinguished but only counteracted, § 116 *a*, and Dig. 2, 14, 27, 2.

Let us consider what is the effect when a disposition originally valid is subsequently followed not by a contrary disposition but by some other circumstance of an adverse or inconsistent character. Some jurists laid down a rule that any circumstances which would have prevented such a disposition having a validity, if they had been present when the disposition was made, invalidate it if they occur subsequently. Etiam ea quae recte constiterunt, resolvi putant, cum in eum casum reciderunt, a quo non potuissent consistere, Dig. 45, 1, 98, pr. E. g. a marriage was dissolved when one of the parties subsequently lost civitas or libertas. But the rule cannot be stated in this broad way: Non est novum, ut quae semel utiliter constituta sunt, durent, licet ille casus exstiterit, a quo initium capere non potuerunt, Dig. 50, 17, 85, 1. Etsi placeat extingui obligationem, si in eum casum inciderit, a quo incipere non potest, non tamen hoc in omnibus verum est, Dig. 45, 1, 40, 2. E. g. a contract is not dissolved by the lunacy of one of the parties. Similarly a Roman testament loses its validity when a testator loses civitas or libertas, but not when he becomes a lunatic. It seems then that no general rule can be applied.

A change in the opposite direction, i. e. from circumstances inconsistent, to circumstances consistent, with a disposition, will not, as a general rule, validate the disposition, or produce what is called convalescence: Quod initio vitiosum est, non potest tractu temporis convalescere, Dig. 50, 17, 29. Omnia, quae ex testamento proficiscuntur, ita statum eventus capiunt, si initium quoque sine vitio ceperint, Dig. 50, 17, 201. Catoniana Regula sic definit, quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocumque decesserit, non valere, Dig. 34, 7, 1, pr. (cf. 2 § 244). But though this generally applied to unconditional legacies, it was not true of institutions of an heir (hereditas), Dig. l. c. 3, nor of all other dispositions. (It is to be noticed that if a disposition was originally invalid on account of want of capacity of a party to it the defect is not cured by the party subsequently becoming capable, a principle equally applicable in the case of the heir as in that of a legatee, cf. 2 § 123, Inst. 2, 13, pr.) E. g. when a non-proprietor alienes and subsequently becomes proprietor, the alienation, originally invalid, convalesces, and the purchaser becomes proprietor without a new tradition, Dig. 41, 3, 42, Windscheid, 1 § 83.

The removal of an exception, e. g. the voluntary ratification of a contract that was originally vitiated by force or fraud, has practically the same effects as convalescence; but cannot properly be called convalescence, because here the disposition, which is supplemented by a subsequent agreement between the parties, is not

originally null and void, but only liable to counteraction. Accordingly in such a case the plaintiff's right would require to be enforced by Replicatio.

3. Exceptions or counteractive pleas, which are the defendant's third means of defence, are either based on the substantive code or on the code of procedure.

(a) Examples of exceptions based on the code of procedure are: that of the case having already reached the stage of Litis contestatio (exceptio rei in judicium deductae): the objection to a minor issue being tried, while a connected major issue from which it cannot be separated is undecided (exceptio praejudicialis), e. g. exceptio quod praejudicium non fiat hereditati: objection to the appointment of a particular procurator by the plaintiff (exceptio cognitoria, procuratoria), § 124.

(b) Examples of exceptions based on the material code are:

In the department of domestic or family law, the exception protecting freedmen against the oppression of their patrons, that is, against a penal bond which a patron had forced his freedman to enter into as security for his good conduct (exceptio onerandae libertatis causa), Dig. 44, 5, 1: or protecting marital rights against paternal rights; i. e. protecting the right of the husband to the society of the wife against her father who endeavours by exercising his patria potestas to break up a united household, Dig. 43, 30, 1, 5.

In the department of law relating to real rights the defendant in a vindicatio by putting forward the exceptio rei venditae et traditae may counterpoise the plaintiff's quiritary title by objecting his own bonitary title, see 2 §§ 40–61, comm.: or he may allege as a counteracting right against the plaintiff's dominion a jus in re, e. g. pignus, Dig. 10, 3, 6, 9, or superficies, Dig. 43, 18, 1, 4. In the actio Publiciana when the purchaser from a non-proprietor endeavours to recover the thing from the true proprietor, the defendant may oppose ownership to bona fide acquisition of possession by putting forward the exceptio dominii: Si ea res possessoris non sit, Dig. 6, 2, 17, said to be the only exception which in form alleges a right of the defendant, whereas all other exceptions, though they too are all virtually and in effect allegations of a right, in external form are allegations of a fact.

In the department of obligation, as well as of real right, the defendant's counteractive plea may be an allegation of Force or Error or that of obligation Formless release (exceptio pacti conventi). Force and Error, as we have seen, may make a disposition voidable, not void.

Although Exceptio is always the allegation of a right of the

defendant, the right which it alleges, though in other respects of the same nature as the right of a plaintiff, is not always sufficiently energetic to form a ground on which an action might be maintained. We have an instance of this inferior energy in the obligatio naturalis which is generated by nudum pactum, of which we read: Igitur nuda pactio obligationem non parit sed parit exceptionem, Dig. 2, 14, 7, 4.

The collision of the rights of the plaintiff and defendant, as expressed in the intentio and exceptio, arises in the majority of cases from the opposition of equity (aequitas) to law, jus strictum, or of jus praetorium to jus civile.

Instances of exceptio founded on jus praetorium are: Exceptio doli, metus, pacti conventi, § 116, hypothecaria, jurisjurandi.

It is, however, erroneous to suppose, as was done in the first edition, that, anomalies disregarded, exceptio is always a plea based on the equitable or praetorian code. This is contrary to the statement of Gaius, § 118, that exceptio may be based on jus civile, and refuted by the following examples of exceptions based on civil law: exceptio dominii, the allegation of civil dominion by the true proprietor who is defendant in an actio publiciana brought by a person who acquired possession from a non-proprietor: exceptio legis Plaetoriae, the allegation of minority. [The lex Plaetoria did not make minors incapable of contracting an obligation, but treated any taking advantage of their inexperience as a ground for relief: otherwise the contracts of minors, like those of impuberes, would have been null and void as against them from the first, and its averment would not have fallen as an exceptio under the third mode of defence, but, as a negation, under the first, like the averment of being under the age of puberty, 1 §§ 197–200, comm.]: exceptio legis Cinciae, Frag. Vat. 266, 310, protecting a donor: exceptio nisi bonis cesserit, arising from the lex Julia, Inst. 4, 14, 4, protecting an insolvent who has made cessio bonorum: exceptio Sc. Macedoniani, protecting filiusfamilias against usurers: exceptio Sc. Vellaeani, protecting women from the consequences of intercessio: exceptio Sc. Trebelliani, protecting an heir who is merely a trustee to convey the inheritance to a beneficiary from the pursuit of the creditors, Dig. 15, 2, 1, 8, see 2 § 253.

Let us examine the meaning of ipsum jus as it occurs in the opposition of actio ipso jure nulla (a right avoided by a destructive plea) and actio ope exceptionis infirmata (a right counteracted by an obstructive plea) or other equivalent expressions.

Ipsum jus sometimes denotes jus civile as opposed to jus praetorium, e.g. in the phrase actiones quae in aliquem aut ipso jure conpetunt aut a praetore dantur, § 112: but this cannot be its

signification here; for the opposition between destruction and obstruction, avoidance and counteraction, is irrespective of the opposition between jus civile and jus praetorium. In a case of avoidance, the plaintiff's claim may be derived not from jus civile but from jus praetorium, e.g. in actio institutoria, § 71, hypothecaria, publiciana: and in a case of counteraction the defendant's plea, as we have seen, may be derived not from jus praetorium but from jus civile, though such a plea or exception originated and was principally allowed by the praetor for the purpose of giving effect to grounds of defence which were not recognized by strict law. Cf. Sohm, § 53.

Ipsum jus as contrasted with exceptio denotes the totality of the conditions comprehended in the intentio—the totality of the elements, positive and negative, that constitute the plaintiff's right: in which definition positive elements are the conditions which call a right into existence; negative elements are the absence of any circumstance which could extinguish an existent right or dismiss it into non-existence. Exceptio, on the contrary, denotes something external to the sphere of the conditions of existence of the plaintiff's right; denotes the existence of an independent adverse right of the defendant. Actio ipso jure nulla will denote a right null and void by the conditions contemplated in the intentio and frequently expressed by the word oportere: actio exceptionis ope infirmata a right defeated by conditions external to the intentio. The words: ipso jure, then, might be paraphrased by the words: si intentionem tantum spectes; or treated as equivalent to: ipsius jure or actoris jure.

The first mode of defence mentioned above denies the existence of one of the positive constituent elements of the plaintiff's right.

The second mode denies the existence of one of the negative constituent elements of the plaintiff's right.

The third mode alleges a countervailing right, vested in the defendant, and generated by a title external to the sphere of the conditions which constitute the right of the plaintiff as expressed in the intentio.

In some cases the partition which separates avoidance (ipsum jus) from counteraction (ope exceptionis) will be extremely thin, and will consist in some arbitrary appointment of positive law. E.g. litis contestatio in judicium legitimum produced avoidance, while litis contestatio in judicium imperio continens only produced counteraction, 3 § 181.

Some extinctions (ipso jure) of a plaintiff's right, where we might have expected only counterpoises (ope exceptionis) or counter rights of a defendant, are to be explained by the fact that there was a period when Roman procedure did not recognize Exceptions—

defences by positive averment of counterpoising rights—(nec omnino ita, ut nunc, usus erat illis temporibus exceptionum, § 108); but required every defence to be in the form of a simple NEGATION—allegation of the original or subsequent NULLITY of the plaintiff's claim. Unlike proceedings by Formula, which besides the ipsum jus of the plaintiff, investigated the counter-claims (Exceptio) of the defendant, statute-process strictly confined itself to a direct affirmation or denial of the plaintiff's right. At such a period one of the devices for giving to the defendant the means of defence which he afterwards had in the form of Exceptio was the introduction into the Substantive code of certain principles respecting the nullification of rights which practically answered the purpose of the Exceptions afterwards introduced into the Adjective code.

An example of such principles is the rule: (Necessariae) impensae dotem ipso jure minuunt, Dig. 23, 4, 5, 2. A husband when compelled to restore the dower to a divorced wife was fairly entitled to deduct what he had been obliged to spend for its conservation during the subsistence of matrimony. To enable the husband to do this the law EXTINGUISHED the wife's right to an equivalent portion of the dower, and thus protected the husband as effectually as if it had given him an Exceptio asserting an independent right of retention. (It is to be noticed that the actio rei uxoriae for the recovery of dos, being regarded as an actio bonae fidei, empowered the judex to take impensae necessariae into account without any exceptio being added to the formula, cf. Sohm, p. 487.) So the rule: Legata pro rata portione per legem ipso jure minuuntur, Dig. 35, 2, 73, 5, gave to an heir the right of retaining his Falcidian fourth as effectually as he could have done by pleading an Exceptio legis Falcidiae. Again the rule: Ipso jure minutum esse peculium, Dig. 19, 1, 30, pr., gave to an heir, when a slave and his peculium had been bequeathed to a legatee, the right of deducting whatever the slave owed by naturalis obligatio to the testator as effectually as if he had been allowed to plead the debt of the slave in an Exceptio, cf. § 73.

It is remarkable that a husband's right, § 44, comm., to deduct from the dower all *utiles* as opposed to *necessariae* impensae was protected by an Exceptio, Dig. 25, 7, 1. As there seems to be no valid reason for a different treatment of utiles impensae and necessariae impensae, the explanation why the deduction of necessariae was effectuated by Extinction and that of utiles by Exception can only be found in the hypothesis that the former right was recognized by the law before, the latter after, Exceptions had been introduced into the Adjective code. Ihering, § 52.

The statement which we meet with in our sources that com-

pensatio or set-off operates ipso jure is one which commentators have been much embarrassed to explain. (Dig. 16, 2, 21 (Paulus) Posteaquam id quod invicem debetur ipso jure compensari, ib. 4 and 10. Inst. 4, 6, 30 ut actiones ipso jure minuant. Cod. 4, 31, 14, pr. Compensationes ex omnibus actionibus ipso jure fieri sancimus.) It is evident that compensation does not operate of itself, but must be expressly pleaded by the defendant, if he so chooses. In actiones stricti juris, though not in actiones bonae fidei, §§ 61, 63, an exceptio had to be inserted in the formula to enable the judex to take compensatio into account. The exceptio which in this restricted form seems to have been first granted by a rescript of Marcus Aurelius was peculiar in this, that its object might be not the absolution of the defendant, but only the diminution of the condemnation. Ipso jure under these circumstances can, it would seem, only mean that if compensatio is successfully pleaded, the debt is regarded as having been pro tanto extinguished from the time when the set-off came into existence, just as the dos would be considered to have been diminished from the time when the impensae were incurred. It is probable, however, that by the law of Justinian the judex had free power of recognizing compensatio in actions of all kinds and not only in actiones bonae fidei. Cf. §§ 61-68, comm., Dr. Moyle's note, Inst. l. c., Sohm, § 89.

Exceptions are capable of various classifications.

As a Negation of the plaintiff's right forms either what we have called the first mode of defence or the second, according as it is founded on a fact contemporaneous or subsequent to the plaintiff's title, so Exceptions rest on facts either contemporaneous or subsequent to those which found the claim of the plaintiff. Examples of contemporaneous exceptions are exceptio rei venditae ac traditae, exceptio metus, averring that a disposition on which the plaintiff relies was originally a valid praetorian title, or that it was a disposition originally vitiated by duress. Examples of subsequent exceptions are the exceptions rei judicatae, longi temporis possessionis, pacti conventi de non petendo. In a Negative averment the subsequent event is ground of avoidance: in an exception the subsequent event is ground of counteraction.

Some exceptions can only be employed by a particular defendant (exceptio personae cohaerens): an example of this is beneficium competentiae, which cannot be pleaded by the debtor's sureties or heirs. Others, and the great majority, are available to all defendants without distinction (exceptio rei cohaerens).

Some exceptions are only available against a particular plaintiff (exceptio in personam). E. g. the exceptio doli, Si in ea re nihil dolo malo actoris factum est, only lies against the person by whose

fraud a disposition was vitiated, his donees and universal successors, in so far as they have been enriched by the dolus; not against a singular successor like a vendee (but the assignee of an action is subject to exceptio doli which was maintainable against assignor). The majority are equally available against all the world (exceptio in rem); e. g. the exceptio metus, which is expressed impersonally, Si in ea re nihil metus causa factum est, and lies against all whose title depends on the vitiated disposition.

The counteraction of the plaintiff's right by exceptio has different degrees of potency. Some exceptions have the stronger effect and deprive the plaintiff's right of all efficacy, barring all obligatio both naturalis and civilis: others have the weaker effect, and though they deprive the plaintiff's right of obligatio civilis, leave it invested with obligatio naturalis. Instances of the weaker effect are the exceptio Sc. Macedoniani, Dig. 14, 6, 10, and beneficium competentiae, Dig. 12, 6, 8. 9. Instances of the stronger effect are exceptio Sc. Vellaeani, Dig. 12, 6, 40, pr.; exceptio doli, Dig. 12, 6, 65, 1; exceptio metus, Dig. 12, 5, 7; exceptio pacti, Dig. 12, 6, 40, 2. The effect of the exceptions of res judicata and prescription or lapse of time, as we have already stated, is controverted: but they both apparently have the stronger operation, except that in real actions prescription or limitation does not entirely annul the right of the proprietor, and prescription of pendency, §§ 104, 105, leaves a debtor subject to naturalis obligatio.

In respect of the burden of proof (onus, necessitas probationis) the following are the leading rules:

The party who asserts a right must prove it, whether the title by which it was conferred is an affirmative or negative fact: Ei incumbit probatio qui dicit non qui negat, Dig. 22, 3, 2. Hence the plaintiff, as a general rule, must prove the intentio: Semper necessitas probandi incumbit illi qui agit, Dig. 22, 3, 21: Actore non probante, qui convenitur, etsi nihil ipse praestat, obtinebit, Cod. 2, 1, 4: and the defendant must prove the exceptio: In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, Dig. 22, 3, 19, pr.

But, further, in the second line of defence the proof of the matter alleged in avoidance is incumbent on the defendant: ut creditor, qui pecuniam petit numeratam, implere cogitur, ita rursum debitor, qui solutam affirmat, ejus rei probationem praestare debet, Cod. 4, 19, 1. In a passage of the Digest this rule is combined with the preceding: Secundum generalem regulam, quae eos qui opponendas esse exceptiones adfirmant, vel solvisse debita contendunt, haec ostendere exigit, Dig. 22, 3, 25, 2.

Moreover in the first line of defence, when it assumes the form of a confession and avoidance; e. g. an averment of the lunacy of a

testator; in other words, when it is contended that a disposition, in consequence of some exceptional circumstance, had not the validity which the law presumes; the proof of this avoiding allegation is on the defendant, Cod. 6, 36, 5. Bethmann-Hollweg, § 109.

In the middle ages the true exceptio or counteractive plea was called exceptio juris: the first line of defence, when it assumed the form of an avoidance, and the second line of defence, whatever its special nature, were called inappropriately exceptio facti. This shows that the true nature of exceptio had been forgotten: the similarity, however, of the three lines of defence in respect of the burden of proof is probably the reason why they were all called exceptio.

The necessity in order to save the plaintiff from being taken by surprise of disclosing by the pleadings whether the defendant relies on the first or second line of defence, e. g. whether he denies that a debt ever existed, or maintains that it was extinguished (for which disclosure there was no provision in procedure by formula), is probably the reason why the second line of defence as well as the third has been treated as an exceptio (Einrede) in modern Germany. (Cf. Civilprozessordnung (146, 276), though in the Bürgerliches Gesetzbuch the word 'Einrede' is used exclusively for pleas constituting the third line of defence, pleas constituting the second line of defence being called 'Einwendungen' (see 202 (2) and 334, 404, 417, 774, 784, 796). The terminology of the B. G. B., as thus indicated, was, we are informed, deliberately adopted by its authors.

The distinction between counteractive and destructive pleas does not seem to have had much influence on English pleading. Stephens in his Commentaries, V. 10, admits that all pleas are not necessarily either traverses or pleas in avoidance; and, as an instance of a plea that falls under neither class, mentions pleas by way of estoppel. One species of estoppel, estoppel by record, is the Roman exceptio rei judicatae: so that here we find recognized a third class of plea under which we might have expected that other averments analogous to other Roman exceptions would be ranged. We find, however, the pleas of the statute of limitations (prescription) and of set-off (compensatio) given as instances of pleas in discharge, i. e. of what we have called the second line of defence, or pleas in avoidance. [For the general theory of Exceptio, see Savigny, §§ 202, 203, 226–229. According to the prevalent opinion of more recent writers the use of the exceptio is not confined to cases in which the defendant may be said to have a counteracting or countervailing right, as our commentary following Savigny supposes, but has a wider application. Cf. Keller, Civil Process, § 34, n. 368, and the literature there cited.]

I proceed to notice some of the points incidentally mentioned by Gaius.

The denial by a defendant that he had received money from a plaintiff would not, in an actio Mutui, appear on the face of the formula: as a simple Negation of the plaintiff's right, it would fall under the first line of defence. It would only assume the form of Exceptio doli, § 116 *a*, in an action brought on a Stipulation. Here the promise of the defendant to repay would establish a right of the plaintiff: but the absence of a previous payment by the plaintiff would give the defendant a countervailing right, to be alleged in an exceptio doli, which as in other cases of exception he would have to prove. It was, however, a usual practice, in the time of the classical jurists and subsequently, for a borrower of money, whether under a contract of stipulation or an informal contract, to give the lender a written document, called cautio, as an acknowledgment of his having received it. A defendant, who had given such an acknowledgment without having in fact received the money would defend himself in all cases by the exceptio doli or exceptio non numeratae pecuniae, as it came to be called. It was provided by a Constitution of the Emperors Severus and Antoninus, A. D. 215, that if an action was brought on such a cautio, and the exceptio non numeratae pecuniae was pleaded in defence, the burden of proving that the money, which was claimed, had been paid should be on the plaintiff instead of being, as in other cases of exception, on the defendant, Cod. 4, 30, 3. But, as we have seen, the rule was established that if the person who had given the cautio allowed a certain period to elapse from the time when it was given, the acknowledgment should be considered presumptive evidence of the money having been received. The period was first fixed at one year, then extended by Diocletian to five years, and finally reduced by Justinian to two, Cod. 4, 30, 14. Cf. Inst. 3, 21, and see 3 §§ 97–109, comm.

§ 117. Intimidation (metus) was ground to support not only an exception, but also an action and an in integrum restitutio. The words of the edict: Ait praetor: Quod metus causa gestum erit ratum non habebo, Dig. 4, 2, 1, 'Duress shall be a ground for rescinding any disposition,' are in rem scripta that is general or impersonal: they are not merely aimed against the intimidator, but promise a remedy even against innocent persons who may have come into possession of property previously acquired by reason of intimidation. The actio quod metus causa was an actio arbitraria, § 47, comm., and during one year the defendant was condemned to pay fourfold damages if he did not make restitution according to the order of the judex: after that it only lay for simple damages. The formula may be thus restored: Si paret metus causa Aulum Agerium fundum illum Numerio Negidio mancipio dedisse neque ea res arbitrio tuo

restituetur neque plus quam annus est cum experiundi potestas fuit, quanti ea res erit, tantae pecuniae quadruplum judex Numerium Negidium Aulo Agerio condemnato: Si non paret absolvito. Lenel, § 39, 3. It was a personal action, and therefore in case of the defendant's insolvency was not an adequate remedy, as the plaintiff then would only share the assets with the other creditors of the defendant. To enable the plaintiff to bring a real action it would be necessary for him to obtain from the praetor the extraordinary relief of in integrum restitutio, a rescission of the forced alienation. He then might bring a vindicatio, which would separate his property from the assets of the defendant over which other creditors had a claim, 3 §§ 77-81, comm.

Dolus, like metus, gave rise to an exceptio, § 117, an actio arbitraria and in integrum restitutio. The actio de dolo malo could only be brought against the party by whose dolus the injury had been caused or his heirs; its object was to condemn the defendant in damages if he did not make restitution, and it originally was prescribed in a year. Constantine, A. D. 319, extended the period of prescription to two calendar years, biennium continuum, Cod. 2, 20, 8. After that period the plaintiff had only an actio in factum for damages to the amount that the defendant had gained by the fraud. The actio de dolo, as also the actio quod metus causa, could only be brought if the plaintiff could not obtain redress by any other action (si alia actio non erit), that is to say they were subsidiary actions.

§ 119. In the exceptio doli the words: Si in ea re nihil dolo malo Auli Agerii factum sit, allege dolus praeteritus, i. e. assert that the right of the plaintiff was vitiated in its origin: the words: neque fiat, allege dolus praesens, i. e. assert that the right of the plaintiff, though originally clear of dolus, is now in collision, to the knowledge of the plaintiff, with a right of the defendant, e. g. the right of compensatio. Dolo facit quicumque id, quod quaqua exceptione elidi potest, petit: nam et si inter initia nihil dolo malo facit, attamen nunc petendo facit dolose, nisi si talis sit ignorantia in eo, ut dolo careat, Dig. 44, 4, 2, 5. The actio de dolo was famosa, i. e. it involved infamia.

The exceptio doli was in jus concepta, bringing both questions of law and fact to an issue, but an exceptio in factum might be substituted for it, e. g. exceptio non numeratae pecuniae, and for any other plea an exceptio doli might be used, if at the time when action was brought the plaintiff knew of its validity. The exception of fraud, being discreditable to the plaintiff, could not be alleged against a parent or patron, but had to be converted into an exception of fact, Dig. 44, 4, 4, 16. Cf. Cic. ad Attic. 6, 1, 15. So again if a neighbour out of humanity enabled a slave to escape from the cruelty of his master, he was liable to an action in factum concepta, not doli. Dig. 4, 3, 7, 7.

Bona fides implies the absence of dolus: so far then as the exceptio merely empowered the judex to take into consideration equitable grounds of defence, no exceptio doli was necessary in actions bonae fidei, for here the commission of the judex expressly authorized him in the intentio of the formula to decide upon equitable grounds (ex bona fide): Judicium fidei bonae est et continet in se doli mali exceptionem, Dig. 30, 84, 5: Cum enim doli exceptio insit de dote actioni, ut in ceteris bonae fidei judiciis, Dig. 24, 3, 21. This, however, does not apply to the exceptio rei in judicium deductae or rei judicatae and others like exceptio cognitoria and litis dividuae, which are founded rather on special considerations than on those relating to bona fides, and had to be expressed in the formula, if they formed the defence of the defendant, even in actions bonae fidei. (Cf. Keller, Civil Process, § 35.)

Cicero gives the form of exceptio doli contained in the edictum Asiaticum of Q. Mucius: Extra quam si ita negotium gestum est ut eo stari non oporteat ex fide bona, Ad Att. 6, 1, 'unless the circumstances of the disposition make its enforcement inconsistent with the principles of good faith.' This seems to be impersonally framed, but the formula, as stated, may be incomplete. (Cf. Dig. 44, 4, 2, 1.)

The exceptio doli from the comprehensiveness of its meaning, does not sufficiently disclose the line of defence which a defendant intends to pursue: accordingly, in Germany, the fact which constitutes the dolus is always required to be specified.

Property became litigious (res litigiosa) as soon as it was the subject of litis contestatio. Originally it was only on the side of the plaintiff (non-possessor) that alienation was prohibited, cf. § 117 a. An edict of Augustus prohibited the alienation of litigated Italic land in terms which perhaps suggest the reason why an exceptio was necessary in order to repel the claims of the alienee. Qui contra edictum divi Augusti rem litigiosam a non possidente comparavit, praeterquam quod emptio nullius momenti est, poenam quinquaginta sestertiorum fisco repraesentare compellitur: res autem litigiosa videtur, de qua apud suum judicem lis delata est: sed hoc in provincialibus fundis prava usurpatione optinuit. Fragmentum Ulpiani, de jure fisci, § 8. 'If, in contravention of the edict of Augustus, an object of litigation is purchased of a vendor not in possession, the sale is not only void but the purchaser forfeits fifty sestertia to the treasury. A thing seems to be an object of litigation, if an action concerning it has been submitted to a judex. This law has, however, been improperly applied to lands in the provinces.' Italic soil was aliened by mancipatio, 2 § 27; and mancipation of land transferred ownership in the property without delivery of possession. The edict only declared the contract of sale

(emptio) void, not the mancipatio. To defeat, therefore, the vindicatio of the purchaser who had become owner, the possessor (defendant in the original suit) required the protection of an exceptio. Alienation by a defendant in possession appears not to have been prohibited, because, the condemnatio in any suit being pecuniaria, it was held that the defendant could not injure the plaintiff by alienation of the specific thing. Cf. Roby, p. 406.

At a later period, when execution in a suit might consist in the compulsory delivery of the specific thing, alienation by a defendant was recognized as an injury to the plaintiff. Accordingly Justinian's code, 8, 36, 2, not only avoided every alienation by a plaintiff of the right of ownership or right of action that he claims, but also alienation by a possessing defendant of property claimed of him by vindicatio, Cod. 8, 36, 5, Nov. 112, 1. If the purchaser has notice of the litigiosity, he forfeits the purchase money to the fiscus, and the vendor forfeits an equal sum. If the purchaser was without notice, he recovers his purchase money and one-third additional from the vendor, who further forfeits two-thirds to the treasury. Vangerow, § 160.

Compare the prohibition of Champerty and Maintenance in English law. Thus buying or selling a disputed title to land not in possession of the sender is Champerty. Whether the title of the vendor be bad or good, if the land is held adversely to him, such a sale is void. Choses in possession (movables) and choses in action may be sold after the institution of a suit, unless the assignment savour of Maintenance, i. e. be made with the design of fomenting litigation.

§ 120. Justinian, Inst. 4, 13, 8, uses the term temporalis as equivalent to dilatoria, but then an ambiguity arises: for temporalis exceptio sometimes denotes the plea of prescription (longi temporis exceptio), e. g. Cod. 12, 30, 52: and the plea of prescription is perpetua, or peremptoria, i. e. not a temporary or dilatory one.

§ 123. The statement of Gaius, that a dilatory exception, if sustained, was fatal to the claim of the plaintiff, as his right of action was consumed, can scarcely have been true of exceptio fori, and exceptio praejudicialis. When a court is incompetent to try a cause or postpones the trial, the instructions to the judge: Si non paret, absolve, are inapplicable. The cause is not heard, and the right of action cannot have been consumed when it has never been exercised.

In the legislation of Justinian, no dilatory exception was a bar to a subsequent institution of a suit. Savigny, § 227.

§ 124. The disability of an infamous person (infamis) to appoint a procurator or to discharge the office of procurator was abolished by Justinian, Inst. 4, 13, 11.

§ 126. The following instances of Replicatio may be found in the

Digest. A person who has appointed two general agents of all his property does not give authority to one of them to sue the other, unless he does so in express terms. The procurator who has such special authority will meet the exceptio of the other procurator, alleging general agency, 'si non mihi mandatum sit, ut a debitoribus peterem,' by a replicatio alleging special instructions to sue him: 'Aut si mihi mandatum est, ut a te peterem,' Dig. 3, 3, 48.

If a woman acting as guarantor in contravention of Sc. Vellaeanum sell and deliver her land to the creditor, she can recover it back by a real action; and meet the exceptio alleging sale and delivery by a replicatio alleging the contravention of Sc. Vellaeanum: 'Aut si ea venditio contra senatusconsultum facta sit,' Dig. 16, 1, 32, 2.

Another text observes that an equality of delict on the part of plaintiff and defendant is more adverse to the plaintiff than to the defendant (Cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris causa), e. g. an exceptio of the defendant alleging fraud on the part of the plaintiff (exceptio doli) is not allowed to be met by a replicatio of the latter alleging fraud on the part of the defendant of the following kind: 'Aut si rei quoque in ea re dolo actum sit,' Dig. 50, 17, 154.

The Replicatio, then, if we trust these examples, was a proposition beginning with the words 'Aut si' (cf. § 126 *a*): and, if this was universal, we must suppose that the expression of Gaius, Si non postea convenerit ut eam pecuniam petere liceret, § 126, only gives the substance of the replicatio, not the precise terms in which it was introduced by the praetor into the formula.

Ulpian, Dig. 44, 1, 2, 3, and Julian, Dig. 27, 10, 7, 1, 2, differ from Gaius in the use of the words Duplicatio and Triplicatio. They identify Duplicatio with Replicatio, counting the pleas from the exceptio; and consequently use Triplicatio to signify an averment which Gaius would call Duplicatio. (For examples of formulae containing Exceptio, Replicatio, Duplicatio, see Keller, C. P., § 37.)

§ 130. The Praescriptio in favour of the plaintiff became obsolete as soon as the old doctrine respecting litis consumptio was abrogated and superseded by more rational rules respecting the operation of Res judicata, §§ 110-113, comm. In the Digest praescriptio has become a mere synonym of exceptio.

§ 131. In connexion with the praescriptio: Ea res agatur cujus rei dies fuit, we may quote an anecdote which Cicero puts into the mouth of Crassus in illustration of the gross ignorance occasionally displayed by the Roman advocate: Quid? his paucis diebus nonne, nobis in tribunali Q. Pompeii praetoris urbani familiaris nostri sedentibus, homo ex numero disertorum postulabat ut illi unde peteretur vetus atque usitata exceptio daretur, CUJUS PECUNIAE DIES FUISSET?

quod petitoris causa comparatum esse non intellegebat: ut [ne?] si ille infitiator probasset judici ante petitam esse pecuniam quam esset coepta deberi, petitor rursus quum peteret exceptione excluderetur, QUOD EA RES IN JUDICIUM ANTEA VENISSET, De Oratore, i. 37. 'A few days ago when I was sitting as assessor of the praetor urbanus, the defendant's advocate pressed the praetor to insert in the formula the old and common exception: IN EXCLUSIVE RESPECT OF THE PAYMENT ALREADY DUE, not knowing that it only protected the plaintiff, saving him, if his demand was proved to be premature, from being barred in a subsequent action by the exception of PREVIOUS LITIGATION.'

When mancipation was the usual mode of transferring property in immovables and was complete without delivery of possession, and when, further, the rules of litis consumptio prevailed, a plaintiff would occasionally need the praescriptio: Ea res agatur de fundo mancipando. § 131 *a*. At a later period transfer of possession (traditio) became the only means of transferring property, and the rules of res in judicium deducta (lis contestata), as we have seen, underwent a reform.

Praescriptio longi temporis, in the legislation of Justinian, is in principle equivalent to Usucapio, though the term usucapio is only used for the acquisition of movable things by possession for three years. This arose in the following manner. A proprietor's right to recover by vindicatio might at an early period be barred by an averment of adverse possession, during ten years, if the parties were domiciled in the same province, during twenty years, if they were domiciled in different provinces (longi temporis possessio). This exceptio of the defendant appeared in the formula in the shape and under the name of a praescriptio (pro reo), which is so called on account of the place it once occupied in the formula, cf. § 133. When, by later legislation, longi temporis possessio accompanied with bona fides became a title whereby property was acquired, it still retained its original name of praescriptio. The term Exceptio longi temporis was a misnomer, because the averment of title by prescription was not an Exceptio but a Negatio of the plaintiff's ownership, i. e. belonged to the second line of defence. Bethmann-Hollweg, § 154.

§§ 136, 137. Savigny, vol. 5, p. 617, supposes that the formula would not contain the word incertum but the substance of the contract, e. g. possessionem tradi, cf. Lenel, § 55. It is probable that in the lacuna § 134 Gaius explained the nature of praescriptiones pro rev.

The leaf containing from intentione formulae, § 134, to aut pro possessore, § 144, was separated from the rest of the Veronese codex, and seen by Scipio Maffei in 1732. It was afterwards published by

Haubold in 1816, the very year in which Niebuhr discovered the rest of the codex.

§ 138. Superest ut de interdictis dispiciamus.

Inst. 4, 15, pr.

§ 138. The last subject to be examined is interdicts.

§ 139. Certis igitur ex causis praetor aut proconsul principaliter auctoritatem suam finiendis controuersiis *inter*ponit. quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contenditur. et in summa aut iubet aliquid fieri aut fieri prohibet. formulae autem *et uerborum* conceptiones, quibus in ea re utitur, interdicta ⟨—⟩ dec*re*-*taque*.

§ 139. In certain cases for the purpose of putting an end to controversies, the praetor or proconsul, directly interposes his authority as a magistrate, which he does then more especially, when possession or quasi-possession is in dispute between the parties: the magistrate in short thus commands or forbids something to be done: the formulae and set terms adapted and made use of for this procedure being called interdicts and decrees.

§ 140. Vocantur autem decreta, cum fieri aliquid iubet, ueluti cum praecipit ut aliquid exhibeatur aut restituatur; interdicta uero, cum prohibet fieri, ueluti cum praecipit ne sine *u*itio possidenti uis fiat, neue in loco sacro aliquid fiat. unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria uocantur.

§ 140. They are called decrees, when he commands that something be done; for instance, when he orders that something be produced, or something be restored: and they are called interdicts, when he prohibits something being done; as when he forbids the violent disturbance of possession acquired without any defect, or the desecration of consecrated ground. Interdicts, then, are orders either of restitution, or of production, or of abstention.

§ 141. Nec tamen cum quid iusserit fieri aut fieri prohibuerit, statim p*er*actum est negotium, sed ad iudicem recuperatoresue it*ur* e*t* ibi editis formulis quaeritur an aliquid aduersus praetoris edictum factum sit uel an factum non sit, quod is fieri iusserit. et modo cum poena agitur, modo sine poena: cum poena, ueluti cum per sponsionem ag*i*tur, sine poena, ueluti cu*m* arbiter petitur. et quidem ex prohibitoriis interdictis semper per sponsionem

§ 141. But the order to do or not to do something does not end the proceedings, since they go to a judex or to recuperators, and formulae having been issued for the purpose, an inquiry is held as to whether anything has been by them done contrary to the praetor's prohibition or omitted contrary to his injunction. And this procedure sometimes is penal, sometimes not penal; penal when it is by sponsio, not penal when an arbiter is demanded (formula arbitraria). Prohibitory interdicts are always carried on by

agi solet; ex restitutoriis uero uel exhibitoriis modo per sponsionem, modo per formulam agitur quae arbitraria uocatur.

§ 142. Principalis igitur diuisio in eo est, quod aut prohibitoria sunt interdicta aut restitutoria aut exhibitoria.

Inst. 4, 15, 1.

§ 143. Sequens in eo est diuisio, quod uel adipiscendae possessionis causa conparata sunt uel retinendae uel reciperandae. Inst. 4, 15, 2.

§ 144. Adipiscendae possessionis causa interdictum accommodat*ur* bonorum possessori, cuius principium est QVORVM BONORVM; eiusq*ue* uis et potestas haec est, ut quod quisque ex his bonis quorum possessio alicui data es*t*, pro herede aut pro possessore possid*eat*, id ei cui bonorum possessio data est restituatur. pro herede autem possidere uidetur tam is qui heres est, qua*m* is qui putat se heredem esse: pro possessore is possidet qui sine causa aliqua*m* rem hereditariam uel etiam totam hereditatem sciens ad se non pertinere possidet. ideo autem adipiscendae possessionis uocatur ⟨*interdictum*⟩, qu*ia* ei tantum utile est, qui nunc primum conatur adipisc*i* rei possessionem. itaque si quis adeptus possessionem amiserit, desinit ei id *inter*dictum utile esse.

Inst. 4, 15, 3.

§ 145. Bonorum quoque emptori similiter proponit*ur* interdictum quod quidam possessorium uocant.

§ 146. Item ei qui publica bona emerit eiusdem condi-

way of sponsio; orders of restitution or production sometimes by sponsio, sometimes by means of a formula arbitraria.

§ 142. The first division, then, of interdicts is that they are either for abstention, for restitution, or for production.

§ 143. The next is into interdicts either for obtaining possession, or for retaining possession, or for recovering possession.

§ 144. An interdict for obtaining possession is issued to the bonorum possessor, beginning: 'Whatever portion of the property;' and injoining, that whatever portion of the property, whereof possession has been granted to the claimant, is in the hands of one who holds as heir or as mere possessor, such portion shall be delivered to the grantee of bonorum possessio. He holds as heir who either is heir or thinks himself heir; he holds as mere possessor who relies on no title but holds a portion or the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession because it is only available to a person endeavouring to acquire possession for the first time, and so ceases to be available to a person who has already had and lost possession.

§ 145. Also the purchaser of an insolvent estate (bonorum emptor) is granted a similar interdict, which some call possessory (interdictum possessorium).

§ 146. Likewise the purchaser of confiscated property at a public

cionis interdictum proponitur quod appellatur sectorium, quod sectores uocantur qui publice bona mercantur.

auction has a similar interdict, which is called sectorium, because the purchasers of such public property are called sectores.

§ 147. Interdictum quoque quod appellatur Saluianum *adipiscendae* possessionis ⟨*causa*⟩ conparatum est, eoque utitur dominus fundi de rebus coloni, quas *is pro* mercedibus fundi pignori futuras pepigisset.

Inst. l. c.

§ 147. The interdict called Salvianum is also an interdict for obtaining possession, and is available to the landlord against the tenant's property which has been hypothecated to him by the tenant as a security for rent.

§ 148. Retinendae possessionis causa solet interdictum reddi, cum ab utr*a*que parte de proprietate alicuius rei controuersia est, et ante quaeritur uter ex litigatoribus possidere et uter petere debeat; cuius rei gratia conparata sunt VTI POSSIDETIS et VTRVBI.

Inst. 4, 15, 4.

§ 148. Interdicts for retaining possession are regularly granted when two parties are disputing about the ownership of a thing, and the question which has to be determined in the first place is which of the litigants shall be plaintiff and which defendant in the vindication; it is for this purpose that the interdicta Uti possidetis and Utrubi have been established.

§ 149. Et quidem VT*I* POSSIDETIS interdictum de fundi uel aedium possessio*ne* redditur, VTRVBI uero de re*r*um mobilium possession*e*. Inst. l. c.

§ 149. The former interdict is granted in respect of the possession of land and houses, the latter in respect of the possession of movables.

§ 150. Et siquidem de fundo uel aedibus interdicitur, eum potiorem esse praetor iubet, qui eo tempore quo interdictum redditur nec ui nec clam nec precario ab aduersario possideat; si uero de re mobili, eum potiorem esse iubet, qui maiore parte eius anni nec ui nec clam nec precario ab aduersario posse*derit*; idque satis ips*is* uerbis interdictorum significatur.

Inst. l. c.

§ 150. When the interdict relates to land or houses, the praetor prefers the party who at the issuing of the interdict is in actual possession, such possession not having been obtained from the opposing party either by violence or clandestinely, or by his permission. When the interdict relates to a movable, he prefers the party who in respect of the adversary has possessed without violence, clandestinity, or permission, during the greater part of that year. The terms of the interdicts sufficiently show this distinction.

§ 151. S*ed* in VTRVBI interdicto non solum sua cu*i*que possessio prodest, sed etiam alteri*us*, quam iustum est ei acc*e*dere, ueluti eius cui heres

§ 151. But in the interdict, 'Whichever party possessed' (interdictum Utrubi), not only the litigant's own possession is taken advantage of for calculating

extiterit, eiusque a quo emerit uel ex donatione aut dotis nomine acceperit. itaque si nostrae possessioni iuncta alterius iusta possessio exuperat aduersarii possessionem, nos eo interdicto uincimus. nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullum est nihil accedere potest. sed et si uitiosam habeat possessionem, id est aut ui aut clam aut precario ab aduersario adquisitam, non datur *ac*cessio; n*am* ei ⟨*possessio*⟩ sua nihil prodest.

the time, but also any possession of another person which may justly be treated as an accessory to it, such as that of a person deceased to whom he succeeds as heir, that of a person from whom he has purchased a thing, or has received it by way of gift or on account of dower; thus if my possession when added to the just possession of another person exceeds in time that of my opponent, I succeed against him in that interdict; but he who has no possession of his own neither receives nor can receive any accession of another's possession; for what is non-existent is incapable of having an accession made to it. But should the possession of a person be a defective one (vitiosa), that is, have been obtained from his opponent either by violence (vi) or clandestinely (clam) or by his leave and licence (precario), he cannot receive any accession to it, for his own possession is of no avail.

§ 152. Annus autem retrorsus numeratur. itaque si tu uerbi gratia VIII mensibus possederis prioribus, et ego VII posterioribus, ego potior ero, quod tr*i*um priorum mensium possessio nihil tibi in hoc interdicto prodest, quod alterius anni possessio est.

§ 152. The year computed is the year immediately preceding; so that if, for instance, you possessed during eight months previous to me, and I during the seven following months, I am preferred, because your possession for the first three months is not counted in your favour in this interdict, it having been in a different year.

§ 153. Possidere autem uidemur non solum si ipsi possideamus, sed etiam si nostro nomine aliquis in possession*e* sit, licet i*s* nostro iur*i* subiectus non sit, qualis est colonus et inquilinus; per eos quoque, apud quos deposuerimus, aut quibus commodauerimus, aut quibus gratuitam habitationem *praestite*rimus, ipsi possidere *uide*mur.

§ 153. But a person is deemed to possess, not only when he possesses himself, but also when any one holds the thing in possession in his name, though the person so holding it is not subject to my power; such, for instance, is the holding of property by a hirer of land (colonus) or of a house (inquilinus). So also a person is deemed to possess by

et hoc est quod uulgo dicitur retineri possessionem posse per quemlibet, qui nostro nomine sit in possessione. quin etiam plerique putant animo quoque *retineri* possessio⟨*nem, id est ut quamuis neque ipsi simus in possessione*⟩ neque nostro nomine alius, tamen si non relinquendae possession*is* animo, sed postea reuersuri inde discesserimus, retinere possessionem uideamur. *adi*pisci uero possessionem per quos possimus, secundo commentario rettulimus. nec ulla dubitatio est quin animo possessionem *adi*pisci non poss*i*mus.

Inst. 4, 15, 5.

§ 154. Reciperandae possessionis causa solet interdictum dari, si quis ex possessione ui deiectus sit; nam ei proponitur interdictum, cuius principium est VNDE TV ILLVM VI DEIECISTI, per quod is qui deieci*t* cogitur ei restituere rei possessionem, si m*odo* is qui deiectus est nec ui nec clam nec precario ⟨*ab eo*⟩ *possederit*; — eum, qui a me ui aut clam aut precario possid*et*, inpune deici*o*.

Inst. 4, 15, 6.

§ 155. Interdum tamen etsi eum ui deiecerim, qui a me ui aut clam aut precario posse*derit*, cogor ei restituere possessionem, ueluti si armis eum ui deiecerim; n*am* propter atrocitatem delicti in tantum patior actionem, ut omni modo debeam ei restituere possessionem. armorum autem appellatione non

means of those with whom he has deposited a thing, or to whom he has lent gratuitous use or habitation of it, as is expressed by the saying that possession is retained by any one who holds a thing in possession in our name. Moreover, it is generally allowed that mere intention suffices for the retention of possession, that is, that although we are neither in possession ourselves, nor any one else in our name, yet if we have gone away without meaning to abandon possession but with the intention of returning, it would seem we still retain possession. The persons by means of whom we may acquire possession were mentioned in the second book; there is not any doubt of the impossibility of acquiring possession by intention alone.

§ 154. An interdict for recovering possession is granted to a person dispossessed of an immovable by violence, beginning: 'In the place whence thou hast violently ejected,' which compels the ejector to restore possession, provided that the person ejected did not acquire possession from the other party either by violence or clandestinely or by his leave and licence. Whereas, if his own possession was thus acquired from the other he may be ejected by him with impunity.

§ 155. Sometimes, however, the person violently ejected, though his own possession was obtained from the opposite party either by violence or clandestinely or by his leave and licence, can claim to be reinstated, that is, when he has been ejected by force of arms: for then on account of the heinousness of the offence I am punished to the

solum scuta et gladios et galeas significari intellegemus, *sed* et fustes et lapides. Inst. l. c.

extent of being compelled by action [i. e. by the interdict de vi armata] to reinstate him whatever the previous circumstances may have been. By the term arms we are to understand not only shields, swords, and helmets, but also sticks and stones.

§ 156. Tertia diuisio interdictorum in hoc est, quod aut simplicia sunt aut duplicia. Inst. 4, 15, 7.

§ 156. A third division of interdicts is into Simple and Double.

§ 157. Simplicia *sunt* ueluti in quibus alter actor, alter reus est, qualia sunt omnia restitutoria aut exhibitoria; namque actor est, qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat. Inst. l. c.

§ 157. Those are simple wherein one party is plaintiff and the other defendant, as always is the case in all the restitutory or exhibitory interdicts; for he who demands the exhibition or restitution of a thing is plaintiff, and he from whom it is demanded is defendant.

§ 158. Prohibitoriorum au*tem* interdictoru*m* alia duplici*a*, alia simplicia sunt. Inst. l. c.

§ 158. Of prohibitory interdicts, some are simple, others double.

§ 159. Simplicia sunt ueluti quibus prohibet praetor in loco sacro aut in flumine publico ripaue eius aliquid facere *r*eum; nam actor e*st* qui desiderat ne quid fiat, reus is qui aliquid facere conatur. Inst. l. c.

§ 159. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from doing anything which is illegal on a public river or on its banks; for he who demands that the illicit act shall not be done is plaintiff, he who is attempting to commit the illicit act is defendant.

§ 160. Duplicia sunt ueluti VTI POSSIDETIS interdictum et VTRVBI. ideo autem duplicia uocantur, quod *p*ar utriusque litigatoris in his condicio est, nec quisquam praecipue reus uel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet; quippe praetor pari sermone cum utr*o*que loquitur. n*am* summa conceptio eorum interdictorum haec est VTI *NVNC* POSSIDETIS, QVOMINVS ITA POSSIDEATIS, VI*M* FIERI

§ 160. Of double interdicts we have examples in Uti possidetis and Utrubi. They are denominated double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but both playing both parts, and both being addressed by the praetor in identical terms. For in brief these interdicts are thus drawn up respectively, 'I forbid violence to be used to prevent your possessing the property as you now in fact possess it'; and the other interdict

VETO; item alterius VTRVBI HIC HOMO DE QVO AGITVR [APVD QVEM] MAIORE PARTE HVIVS ANNI FVIT, QVOMINVS IS EVM DVCAT, VI*M* FIERI VETO. Inst. l. c.

§ 161. Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus. et incipiamus a si*m*-*pl*icibus. Inst. 4, 15, 8.

§ 162. ⟨*Si*⟩ igitur restitutorium uel exhibitorium interdictum redditur, ueluti ut restituatur ei possessio qui ui deiectus est, aut exhibeatur libertus cui patronus operas indicere uellet, modo sine periculo res ad exitum perducitur, modo cum periculo.

§ 163. Namque si arbitrum postulauerit is cum quo agitur, accipit formulam quae appellatur arbitraria, et iudicis arbitrio si quid restitui uel exhiberi debeat, id sine periculo exhib*e*t aut restituit, et ita absoluit*ur*; quodsi nec restituat neque exhibeat, quanti ea res est condemnat*ur*. s*ed* et acto*r* sine poena experitur cum eo, que*m* neque exhibere neque restituere quicquam oport*et*, praeterquam si calumniae iudicium ei oppositum fuerit decimae partis. quamquam Proculo placu*it* *denegan*dum calumniae iudici*um ei* qui arbitrum postulaue*rit*, quasi hoc ipso confessus uideatur restituere se uel exhibere debere. sed alio iure utimur et recte; *p*otius enim ut modestiore uia litig*et*, arbitrum quisque petit, quam quia confitetur.

runs thus, 'I forbid violence to be used to prevent the party who has possessed the slave during the greater part of the year from taking him away.'

§ 161. After classifying interdicts we have next to explain their process and result; and we begin with the simple.

§ 162. When an order of restitution or production is issued, for instance, of restitution of possession to a person who has been forcibly ejected from it, or of production of a freedman whose services his patron intends to call into request, the proceedings are sometimes penal, sometimes not penal.

§ 163. For when arbitration is demanded by the defendant, he receives what is called a formula arbitraria, and if by the arbitration of the judex he is directed to restore or produce anything, he either restores or produces it without further penalty and so is absolved, or if he does not restore or produce it he is condemned, but only to make good whatever loss is caused to the plaintiff by his not obeying the order of the judex. Neither does the plaintiff incur any penalty for suing a defendant who is not obliged to produce or restore, unless he is challenged by the defendant to an action for vexatious litigation (calumniae judicium) to recover from him a tenth of the object of the suit by way of penalty. For though Proculus held that the demand of arbitration precludes the defendant from suing for vexatious litigation, on the ground that it is an admission by him of an obligation to restore or to produce the thing, we adopt the contrary view and justly so; for

the demand of an arbiter shows that the defendant wishes to litigate in a more moderate way, but not that he confesses the opponent's claim.

§ 164. Obseruare ⟨*autem*⟩ debet is qui uult arbitrum petere, ut statim petat antequam ex iure exeat, id est antequam a praetore *dis*cedat; sero enim petentibus non indulg*e*tur.

§ 164. The defendant must be careful, if he wishes to demand an arbiter, to make the demand at once before he leaves the court or tribunal of the praetor; for a subsequent demand will not be granted.

§ 165. I*ta*que si arbitrum non petierit, sed tacitus de iure exierit, cum periculo res ad exitum perducit*ur*. nam actor prouocat aduersarium sponsion*e*, ⟨*quod*⟩ contra edictum praetoris non exhibuerit aut non restituerit; ille autem aduersus sponsionem aduersarii restipulatur. deinde actor quidem sponsionis formulam edit aduersario, ille huic inuicem restipulationis. sed actor sponsionis f*ormulae* s*ubicit* et aliud iudicium de re restituenda uel exhibenda, ut si sponsione uicerit, nisi ei res exhibeatur aut restituatur, ———|
(24 *uersus in C legi nequeunt*)
———|— aliud facere quam qu — dicat q*u*———|
(7 *uersus in C legi nequeunt*)
———|—— appellata—|
(5 *uersus in C legi nequeunt*)
———|—intelle——|———|
———|—qua——|
(3 *uersus in C legi nequeunt*)
———|modis —— |—paratus fuit ——|
(3 *uersus in C legi nequeunt*)

§ 165. Thus if he leaves the court without requesting an arbiter, the proceeding is brought to an issue attended with risk to the parties: for the plaintiff challenges the defendant to wager a sum to be forfeited by the defendant if he has contravened the edict of the praetor by failing to produce or restore; and the defendant challenges the plaintiff to a counter-wager of a similar sum to be forfeited by the plaintiff upon the opposite condition. The plaintiff then delivers the formula of the wager to the defendant, and the defendant in turn delivers the formula of the counter-wager. But the plaintiff adds to the formula of the wager another action for the production or restoration of the thing in dispute, in order that if he obtains judgment in the action on the wager and the thing is not restored or produced, *the defendant may be condemned in damages to the amount of its value.*

§ 166. ———|— fructus licitando, is tantisper in possessione co*n*|stituitur, si modo aduersario suo fructuaria stipu*latione* ca|*uerit*, *cuius* uis *et* potestas haec est, ut si contra

§ 166. *When a double interdict has been issued*, the interim possession or mesne profits are sold by auction, and the higher bidder of the litigants is placed in possession pending the controversy,

eum *de poss*|essi*one* pronun*tia-tum f*uer*it*, *e*am summam ad-uer|sario soluat. haec autem licendi contentio fructus licita-|tio uocatur, scilicet quia ——| ——. postea alter | alterum sponsione prouocat, quod ad-uersus edictum praetoris possi-denti sibi uis facta *sit*, et inui-cem ambo restipulan|tur aduer-sus sponsionem ; uel——| una inter eos sponsio item*que re*sti-pulatio u*n*a —— |ad eam fit. ——|———|resti—.

provided that he gives his opponent security by the fructuary stipulation, the force and effect of which is that if judgment on the main question of possession is pronounced against him, he has to pay to the other party the sum mentioned in the stipulation. This bidding of the parties against one another is called a bidding for the fruits, because the parties contend with one another in this way as to the power of taking the fruits of the thing during the preliminary interdict procedure. After this each party challenges the opponent to wager a sum to be forfeited by the promisor if he has contravened the edict by violently disturbing the possession of the promisee, and each party, after binding himself as promisor in a wager, becomes the promisee in a similar counter-wager.

§ 166 *a*. Iudex apud quem de ea | re agitur illud scilicet requirit, ⟨*quod*⟩ praetor inter-dicto conplexus est, id est uter eorum eum fundum easue aedes per id tempus quo interdict*um* redditur, nec ui nec clam nec precario poss*e*der*i*t. cum iudex id explorauerit et forte secun-dum me iudicatum sit, aduer-sarium mihi et sponsionis et restipulationis summas quas cum eo feci condemnat, et conuenienter me sponsion*i*s et restipulationis quae mecum factae sunt absoluit. et hoc amplius si apud aduersarium meum possessio est, qu*ia* is fructus licitatione uicit, nisi re-stituat mihi possessionem, Cas-celliano siue secutorio iudicio condemnatur.

§ 166 *a*. The judex who tries the action has to inquire into the question proposed by the praetor in the interdict, namely, which party was in possession of the house or land in question at the time when the edict was issued, not having acquired it from the other party either by violence or clandestinely or by his leave and licence. When the judex has thus inquired and has, it may be, decided the case in my favour, he condemns my adversary in the penal sums of the actions on the wager and counter-wager in which I was promisee, and absolves me in the actions upon the wager and counter-wager in which I was promisor; and, if my opponent is in possession as higher bidder in the auction, unless he restores possession, he is condemned in the action called Cascellianum or Secutorium.

§ 167. Ergo is qui fructus licitatione uicit, si non probat ad se pertinere possessionem, sponsionis et restipulationis et fructus licitationis summam poenae nomine soluere et praeterea possessionem restituere iubetur; et hoc amplius fructus quos interea percepit reddit. summa enim fructus licitationis non pretium est fructuum, sed poenae nomine soluitur, quod quis alie*n*am possessionem per hoc te*m*pus retinere et facultatem fruendi na*n*cisci conatus est.

§ 168. Ille autem qui fructus licitatione uictus est, si non probauerit ad se pertinere possessionem, tantum sponsionis et restipulationis summam poenae nomine debet.

§ 169. Admonendi tamen sumus liberum esse ei qui fructus licitatione uictus erit, omissa fructuaria stipulatione, sicut Cascelliano siue secutorio iudicio de p*osses*sione reciperand*a* experitur, ita *similiter* de fructus licitatione agere. in quam rem proprium iudicium conparatum est quod appellatur fructuarium, quo nomine actor iudicatum solui satis accip*it*. dicitur autem et hoc iudicium secutorium, quod sequitur sponsionis uictoriam; sed non aeque Cascellianum uocat*ur*.

§ 170. Sed quia nonnulli interdicto reddito cetera ex interdicto facere nolebant, atque ob id non poterat res expediri, praetor in eam rem prospexit et conparauit interdicta quae

§ 167. So that if the higher bidder in the auction fails to prove that he is entitled to possession, he is ordered to pay the sums of the wager and counter-wager in which he was promisor, and the price he offered for the mesne profits at the sale by auction, by way of penalty; and further, to restore possession of the thing in question, and restore any profits which he has made from the thing; for the sum of money fixed by the auction is not the price of the mesne profits, but a penalty for attempting to retain the possession that belonged to another and for thus obtaining the power of getting the fructus of the thing.

§ 168. If the unsuccessful bidder in the auction fails to prove that he had possession, he is only condemned to pay the sum of the wager and counter-wager by way of penalty.

§ 169. We shall notice, however, that it is open to the unsuccessful bidder instead of proceeding on the fructuary stipulation, to bring an action upon the sale by auction which is called fructuarium, just as he brings the Cascellianum or Secutorium action for recovering possession; for this purpose a special action has been established which is called fructuary (judicium fructuarium): this action, as following the result of the action on the wager, is also called consequential (Secutorium); but is not also called Cascellianum.

§ 170. As sometimés, after the issue of an interdict, one of the parties declined to take one of the subsequent steps, and the proceedings came to a stand-still, the praetor has provided for this

secundaria appellamus, quod secundo loco redduntur. quor*um* *uis et potestas* haec est, ut qui cetera ex interdicto non faci*at*, ueluti qui uim non faciat aut fructus non lice*a*tur aut qui fructus licitationis sat*is* non d*e*t aut si sponsione*s* non faci*at* sponsion*um*ue iudicia non accipiat, siue possidea*t*, | restituat aduersario possessionem, s*iue* *non* posside|*at*, uim illi possidenti n*e* faciat. ita*q*ue etsi alias potue*rit* | interdicto VTI POSSIDETIS uincere, si cetera ex interdict*o* | —— per interdictum secundarium —|—
(2 *uersus in C legi nequeunt*)
——| —— secundarium—| ——
quamuis hanc opinion*em*—|— Sa*bi*nus et Cassius secuti fuerint—|—
(9 *uersus in C legi nequeunt*)
———|
(20 *uersus in C legi nequeunt*)
———|.

contingency, and invented the so-called secondary interdicts, which in such a case are issued: whose effect is, that if a party decline to take any necessary step in the interdict procedure, such as to violently eject the other party (vis ex conventu), or to bid in the auction for the mesne profits, or to give security for the mesne profits, or to enter into the wagers, or to undertake the trial on the wagers, he shall, if in possession, be obliged to make over the possession to the other party, if out of possession he must not violently eject the other party, and so, although he might have been successful in maintaining the interdictum Uti possidetis if he had complied with the requisites of procedure, possession will be given by the secondary interdict to the other party, if he has not done so.

Interdicts are characterized by Gaius, § 135, as proceedings wherein the praetor *principaliter* auctoritatem suam interponit. Principaliter may simply refer, as was assumed in the first edition, to the chronological order of steps in legal proceedings; and then interdict procedure will be characterized by the fact that it opens with a command of the praetor (interdictum) whereas ordinary procedure opened with an act of the plaintiff (in jus vocatio), and the praetor's authority was not very signally manifested, at least in statute-process, till the stage of execution (addictio, missio in possessionem). But Bethmann-Hollweg, § 98, seems correct in giving a less insignificant meaning to the term which expresses the essential contrast of Interdict and Action, and interpreting the word principaliter as expressive of the pre-eminence, supremacy, or absolute power, of the praetor in the sphere where interdicts were employed. The contrast then will be between the jurisdictio of the praetor and his imperium. In his jurisdictio his functions are merely ministerial or ancillary to those of the legislator: in his imperium, as conservator of order, custodian of the peace (to use modern phrases), and repressor of violence, he is invested with a portion of the sovereign power. This antithesis of

the Praetor merely administering the ordinary law, and his exercising a quasi-legislative power in extending it meets us in several fundamental classifications of Roman jurisprudence: it has already been indicated in connexion with the contrasted terms, judicia legitima and judicia imperio continentia, §§ 103–109, comm., and the present is a fitting place for again noticing some of its principal aspects.

(1) Statute-process and the Formulary system are contrasted by the respective predominance in each of the legislator and administrator. In Legis actio the Legislator and the Litigants seem alone to occupy the scene. The Praetor is only present as master of the ceremonies, and even as such can only utter sentences which the Legislator has previously dictated. In the Formulary system the Praetor appears with much larger attributes; he seems to have stepped in front of the Legislator and has taken much of the initiative from the Suitors. Thus, marking the respective prominence of the STATUTE and the ADMINISTRATOR, we might denominate the older and younger systems as Legis actio and Praetoris interpositio: and it is this accentuation of the statute-book or lawgiver as opposed to the tribunals or executive that the translation has attempted to express in offering the invented term Statute-process as a version of Legis actio.

(2) Both Statute-process and the Formula, as representing at different periods the Ordo judiciorum or ordinary course of procedure, by which a magistrate appointed a judex to try a case, exemplify the predominance of the lawgiver as contrasted with that of the magistrate, when opposed to extraordinary procedure or Cognitio extraordinaria praetoris. The latter, in which no judex was appointed, the proceedings throughout being under the direct cognizance of the magistrate, was the appropriate procedure in plaints between children and their parents or between patrons and freedmen in cases of excessive cruelty of masters to slaves, or in cases of injury by law occasioned by some exceptional circumstance—fraud, violence, absence, ignorance, minority (for an account of the praetor's extraordinary remedy on this account by in integrum restitutio see 1 §§ 197–200, comm.)—so exceptional that it had been overlooked or disregarded in the rules of jus strictum respecting the validity of legal dispositions. Interdicts seem also to have originally belonged to this extraordinary jurisdiction of the praetor, who intervened in this way in the interest of public order. In most of such cases, but not in all (e.g. fideicommissa, though belonging to cognitio extraordinaria, were instituted by Augustus, Inst. 2, 23, 1), the praetor by his inquisition and decree (§§ 103–109, comm.) superseded not only the judex but also the lawgiver, who had uttered no commands respecting the various circumstances above enumerated.

(3) The same antithesis meets us as a principle of division even

within the limits of Ordo judiciorum. Here we find on the one hand the class of actiones legitimae, actions of civil law, including under one of the wider acceptations of civil law actiones bonae fidei (as to the meaning of actio legitima, cf. Roby, 1, p. 95, n. 1); and on the other the class of actiones praetoriae, that is, actiones ficticiae or actions with a variation of persons in the intentio and condemnatio or actions with a formula in factum concepta. In the latter class the praetor, except so far as he abstained with a demure deference from inserting in the formula the formal term for a legal obligation Oportere, certainly exercised the attributes of a legislator. A similar, though not identical division, as already has been mentioned, §§ 103–109, comm., was that into judicia legitima and judicia imperio continentia; a division that, speaking roughly, corresponded to the functions of the praetor in imperial Rome and the functions of the magistrate in the subject provinces. This last division, though important in its time, was more purely historic and accidental than the preceding: it has left a less permanent impress on Roman law, and its traces are nearly effaced from the compilation of Justinian.

(4) Interdict procedure, as opposed to the regular mode of litigation, is defined by Gaius by the characteristic feature that the magistrate *principaliter auctoritatem suam interponit*. This feature, as we have now seen, was not peculiar to Interdicts: but if we suppose that Interdicts were coeval with Statute-process and originally formed a matter of Cognitio extraordinaria; and that, further, the other subjects of cognitio extraordinaria were then imperfectly developed; at such a period Interdicts would form the most signal manifestation of magisterial auctoritas: and it is perhaps to a jurist of this period that the definition we have quoted is due. So large a power of the magistrate must however have seemed, even at Rome, inconsistent with republican liberty: moreover he would from an early time have found it inconvenient to inquire himself whether his command had been obeyed. Hence a judex was appointed to decide this question, and so the interdict became merely a conditional order, directed to the parties, under which the judex was bound to hold a trial, if necessary, in the ordinary form, that is by actio ex sponsione or by actio arbitraria (§ 141), and to condemn or absolve according to his finding (cf. Sohm, p. 307); and in Interdict procedure, as we know it, obedience to the praetor's decree is not enforced by the praetor himself but by a judex, and by legal proceedings in the ordinary form; either, that is, by an actio ex sponsione or by an actio arbitraria (§ 141). Accordingly in the last period we find Interdict procedure opposed to Cognitio extraordinaria and ranked under the contra-distinguished class of Jus ordinarium or Ordo judiciorum. Thus the Interdict became rather a matter of jurisdictio than of im-

perium. However, it still remained true that in issuing an Interdict the praetor had spoken with the voice of a sovereign. This precept is not an application of some general command of the legislator, but is itself a law, and will serve as the governing principle of future adjudication. If we describe Law as a universal interdict addressed by the legislator to the community, Interdict may be described as a particular Law addressed by the magistrate to individuals. This will appear more plainly when we come to the details of Interdict procedure.

Interdicts relate to subjects in almost all departments of the code.

A. In jus publicum and jus sacrum we find the interdicts relating to sacred places and public places—public roads or public rivers. These places are protected by interdicta popularia, interdicts in which any individual may vindicate as prosecutor the interests of the public, Dig. 43, 8, 2, 34.

B. In the law of status and the law of domestic relations there are the interdictum de homine libero exhibendo, Dig. 43, 29, a kind of Writ of Habeas Corpus: interdicta de liberis exhibendis and de liberis ducendis, protecting the patria potestas, Dig. 43, 30: and de liberto exhibendo, assisting the patron.

C. In the code of Property (res familiaris) and (1) in the department of res singulae we have the interdicts Utrubi, Uti possidetis, and Unde vi, relating to the possession of movables and immovables: and others, closely allied, similarly related to the quasi-possession of servitudes. In controversies between owners of neighbouring land and others we have interdictum Demolitorium based on Operis novi nunciatio (an admonition of the defendant which might be served on him by any citizen to desist from some building innovation), an interdict requiring the demolition of the building erected in spite of such prohibition on the part of the plaintiff (nuncians), and before such prohibition was set aside by judicial authority, Dig. 39, 1, 20, pr.; cf. Windscheid, Pand., § 466, n. 12: and the interdict Quod vi aut clam, similarly requiring the restitution or undoing of some innovation in land (polluting streams, cutting trees, ploughing up pasture, &c.) that has been executed either furtively or in face of the prohibition of some party who is interested and who has jus prohibendi, Dig. 43, 24: and other interdicts de arboribus caedendis (as to the fifteen feet space required cf. Windscheid, § 169, n. 12) and de glande legenda, Dig. 43, 27: and 28, enforcing provisions derived from the Twelve Tables.

I said that interdicts were to be found in *almost* all departments of the code. It is observable that no interdicts are employed in the law of Obligation (jus in personam) except in so far as they protect obligations secured by way of pledge or hypothec. Thus

interdictum Salvianum (§ 147; Inst. 4, 15, 3; Dig. 43, 33; Cod. 8, 9; cf. Windscheid, § 236, n. 5) protects the landlord in the recovery of his rent by preventing the tenant from taking away his goods from the premises demised.

(2) In the law of inheritance we have the interdicts Quorum bonorum, § 144, Dig. 43, 2, and Quod legatorum, Dig. 43, 3, in aid of the praetorian successor and heir.

D. In the law of Procedure we have the interdicts Quem fundum, Quam hereditatem, Quem usumfructum, § 89, and the interdicta Secundaria, § 170, compelling a defendant in a restitutory or exhibitory interdict to defend himself in the mode prescribed by the law under pain of forfeiting possession. Here too we may place the interdicts Utrubi and Uti possidetis, so far as they are not themselves final suits but only means of determining provisional or interimistic possession during the pendency of the definitive vindicatio: and here too, if we look on Quorum bonorum as standing to hereditatis petitio in the same relation in which Uti possidetis stands to vindicatio, i. e. as merely preparatory to the final suit, we may place the interdict Quorum bonorum. At a later stage of proceedings the interdict Ne vis fiat ei, qui in possessionem missus erit, Dig. 43, 4, protects the creditor who has obtained execution. The interdictum fraudatorium protects the creditor against fraudulent alienation by an insolvent debtor, Dig. 42, 8: the interdictum possessorium and interdictum sectorium, §§ 145, 146, protect the purchaser of the estate of the insolvent or the condemned criminal.

As an alternative to some of these interdicts, the plaintiff had his option of an actio in factum: e. g. an alternative to interdictum Salvianum was actio Serviana, Inst. 4, 6, 7; and an alternative to interdictum fraudatorium was actio Pauliana, Dig. 22, 1, 38, 4. Or possibly in these cases also the Interdict was the provisional, the Action the definitive proceeding.

§ 140. Restituere in respect of the acts which it denotes is a word of many meanings, and comprehends several acts which in physical character have little in common but the name. Sometimes it means the restoration of an unlawful structure to its original condition: e. g. Quod in flumine publico ripave ejus fiat, sive quid in id flumen ripamve ejus immissum habeas, quo statio iterve navigio deterior sit, fiat, restituas, Dig. 43, 12, 1, 19. 'What you have built in a public river or on its bank, or what you have discharged into the river or on to its bank, interfering with the anchorage or passage of vessels, I command you to re-establish.' Sometimes it means the restoration of possession, as in the interdict Unde vi, § 154; sometimes the delivery of possession, where no possession has preceded, as in the interdict Quorum bonorum, § 144. But in spite of the variety of physical acts

which it denotes, the word Restituere is univocal if we look at its legal connotation, which is always the undoing of some wrong, the reinstatement of a person in the possession and enjoyment of a right.

Exhibere is the production of a thing or person, and was usually the preliminary of a vindication. Quem liberum hominem dolo malo retines, exhibeas, Dig. 43, 29, 1. 'The freeman whom you unlawfully detain I command you to produce.' Qui quaeve in potestate Lucii Titii est, si is eave apud te est, dolove malo tuo factum est quominus apud te esset, ita eum eamve exhibeas, Dig. 43, 30, 1. 'The son or daughter of Lucius Titius, who is subject to his power, and whom you detain or have by your act fraudulently ceased to detain, I command you to produce.'

§ 144. The interdict Quorum bonorum, according to Savigny, was the remedy whereby an heir, whether civil or praetorian, and, if praetorian, whether contra tabulas or secundum tabulas or ab intestato, having already, in response to his demand (agnitio) of the succession, obtained from the praetor the formal grant (datio) of bonorum possessio, maintained his title thereto before the tribunals if he met with opposition ; just as hereditatis petitio was the remedy whereby the civil successor could have maintained a corresponding claim to the hereditas. But according to what is now the prevalent opinion this interdict had a more limited application than hereditatis petitio, being confined in its object to obtaining possession of corporeal objects belonging to the inheritance. Cf. 3 §§ 18–38, comm.

The terms of the interdict ran as follows : Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides possideresve, si nihil usucaptum esset, quodque dolo malo fecisti uti desineres possidere, id illi restituas, Dig. 43, 2, 1. 'Whatever portion of the goods, granted in pursuance of my edict to be possessed by such and such a one, thou possessest as heir or as possessor, or wouldest so possess but for usucapion, or hast by your act fraudulently ceased to possess, such portion do thou deliver up to such a one.'

Quorum bonorum was the proper remedy against two classes of adversary: (1) any one who claimed as heir (pro herede), either under the praetorian edict or as fideicommissarius, Dig. 5, 3, 20, 13, or at civil law ; and (2) praedo, or any one who seized and held without title, or merely by title of occupancy (pro possessore), in virtue of the anomalous law which permitted strangers to seize vacant hereditaments, and convert possession into ownership by a short period of usucapion, 2 § 52. If the adversary claimed on any other title, e. g. pro empto or pro donato, the proper remedy of bonorum possessor or heres was not by Quorum bonorum nor by Hereditatis petitio, but by an ordinary Real action (Rei vindicatio). The words 'possideresve

si nihil usucaptum foret' are a trace of the Sc. mentioned in 2 § 57 (cf. comm. to this passage), which relieved the grantee of possession against usucapion, i. e. which rescinded the usucapion, and allowed Quorum bonorum to be brought even after usucapion had been completed and the bona fide putative successor or the mala fide unentitled occupant no longer possessed pro herede or pro possessore, but pro suo. (According to Puchta, usucapion was always unavailing against Quorum bonorum, and the effect of the Sc. was only to assist the heir at civil law, by inserting in the formula of Hereditatis petitio a clause that had always as a matter of course been inserted in the interdict Quorum bonorum.)

According, then, to Savigny, Quorum bonorum was a definitive suit in matters of succession when the plaintiff, instead of claiming hereditas in reliance on jus civile, claimed bonorum possessio in reliance on jus praetorium. But the prevalent opinion is that of Vangerow, that Quorum bonorum was merely a summary and provisional procedure for obtaining possession of corporeal objects belonging to the inheritance pending the definitive suit for the succession. The ultimate title to the estate would be determined by an hereditatis petitio if the suit was brought by the heir, or by an hereditatis petitio possessoria, if the suit was brought by the praetorian successor, Dig. 5, 5, 1. In support of this view, it may be observed that on Savigny's hypothesis no satisfactory account can be given of the nature of hereditatis petitio possessoria.

§ 148. In the real actions of statute-process or the eldest system the award of provisional possession during the pendency of a suit was called Vindicias dicere, cf. § 16 and Gellius 20, 10. In the later methods of real action, vindicatio per sponsionem or per formulam petitoriam, Vindiciae dicendae was apparently superseded by the interdicts Utrubi and Uti possidetis; which, accordingly, would bear the same relation to vindicatio that Quorum bonorum bore to hereditatis petitio.

As these interdicts were required to determine the question who should have possession pending the vindicatio, so it is clear that a third anterior proceeding would be necessary to determine who should have provisional possession during the pendency of litigation on the interdict: and similarly we might imagine a fourth, a fifth, and in fact an infinite series of anterior proceedings to be required. We shall find, however, that this regressus ad infinitum was stopped at the third term by means of an auction (fructus licitatio), § 166, a process of a very summary character. If a party attempted to defeat this provision by refusing to take part in the auction, his opponent was aided by interdicta Secundaria, § 170. It may seem that opposition to the issue of interdicta Secundaria would again

open out a vista of an infinite series of anterior steps; but, doubtless, the only means of preventing the issue of interdictum Secundarium was an instant consent to co-operation in fructus licitatio.

Fructus licitatio was obsolete in the time of Justinian: in modern Italy and Germany it is superseded by a process called Possessorium Summarissimum; in which the judge on a brief inquisition provisionally awards possession to the party who proves the last act of undisturbed possession.

The proceedings in a double interdict were somewhat complicated, but the decision ultimately depended on the result of the trial of one of the sponsionum formulae. The interdict Uti possidetis was of the following form: Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto. De cloacis hoc interdictum non dabo: neque pluris quam quanti res erit; intra annum, quo primum experiundi potestas fuerit, agere permittam, Dig. 43, 17, 1, cf. 160. 'Whichever party has possession of the house in question, without having acquired it either by violence, or clandestinely, or by leave and licence of the adversary, the violent disturbance of his possession I prohibit. Sewers are not included in this interdict. The value of the thing in dispute and no more may be recovered, and I will not allow a party to proceed in this way except within the first year of days available for procedure (annus utilis).' The right of the possessor was not affected if his possession was commenced either by violence, or clandestinely, or by permission in respect of any other person than the defendant. Inst. 4, 15, 4.

The interdict Utrubi was of the following form: Utrubi hic homo, quo de agitur, majore parte hujusce anni fuit, quominus is eum ducat, vim fieri veto, Dig. 43, 31. 'Whichever party had possession of the slave in question during the greater part of the preceding year I prohibit violence being used to prevent him from taking the slave.' The same exceptions of violence, clandestinity, and permission, as in the interdict Uti possidetis, were either expressed or understood. Before Justinian's time Utrubi had been assimilated to Uti possidetis, that is, comparative length of possession within the year was made immaterial, Inst. 4, 15, 4. 'But at the present time the practice is different; for both interdicts, so far as the question of possession is concerned, are on the same footing; so that in respect both of land and movables judgment goes for him who proves that he was in actual possession at the moment of joining issue in the action, not having acquired it from the other party either by violence, or clandestinely, or by his leave and licence.' Thus the protection of these interdicts is generally afforded to the party in actual possession, the question of his right to possess being

disregarded. And this protection of possession is allowed even against the owner himself, who cannot plead exceptio dominii, but to recover possession must prove his title by an independent vindicatio.

Utrubi and Uti possidetis are classed by Gaius under the head of interdicta Retinendae possessionis. This was their category when either party succeeded in proving that he was in actual possession at the time of bringing the interdict, unless such possession could be impeached by the other party on one of the above mentioned grounds: but the exceptions, vi clam aut precario, when sustained by the non-possessor, might in fact bring Utrubi and Uti possidetis under the category of interdicts Recuperandae possessionis. If, that is to say, a litigant proved that he had actual possession, but his possession was shown to be vitiated by violence, secrecy, or permission, he was dispossessed and his opponent who was equally plaintiff in the action was reinstated in possession, which he was presumed never to have lost, Dig. 43, 17, 3, pr. Utrubi was clearly a recuperatory interdict in its original form: but it might be so equally, in virtue of the exceptions, after its form had been assimilated to that of Uti possidetis. Baron, § 120. Sohm, p. 353.

§ 154. The interdict Unde vi (or De vi) which was applicable only to land had two forms, one of which is called by Cicero interdictum quotidianum, and redressed cases of ordinary violence (vis quotidiana), while the other was invoked in cases of armed violence (vis armata). The exceptio vitiosae possessionis (vi, clam, precario) could be pleaded as a defence to the former, but not to the latter, interdict. Like Uti possidetis and Utrubi the interdict Unde vi was based simply on the ground of possession, not on title or right to possess.

The interdictum quotidianum has been thus restored from indications in Cicero, Pro Caecina and Pro Tullio (Caec. 31 § 91; Tull. 19 § 44): Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi dejecisti cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo restituas. 'In the place whence thou or thy slaves or procurator hast this year violently ousted him or his slaves or procurator from possession, which possession he held without having acquired it from him either by violence, or clandestinely, or by his leave and licence, in that place do thou reinstate him in possession' (cf. Lenel, p. 379 et seq.).

The interdict De vi armata may be restored as follows: Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius vi hominibus coactis armatisve dejecisti eo restituas. 'In the place whence thou or thy slaves or procurator hast violently ejected him or his slaves or procurator by men assembled or armed, in that place do thou reinstate him in possession.' This differed from the ordinary interdict by the omission of the exceptions, and the

omission of limitation to a year. (Cf. Roby, 1, p. 462 et seq., 2, App. D, pro Caecina; Sohm, p. 354 et seq.)

The interdict Unde vi only applied to immovables. Illud utique in dubium non venit, interdictum hoc ad res mobiles non pertinere, Dig. De vi et de vi armata, 43, 16, 1, 6. 'It is certain that this interdict is not available in the case of movables.'

The right of the defendant in the ordinary interdict (quotidianum) to plead by way of exception the vices (violence, secrecy, permission) by which the plaintiff's possession was tainted, was apparently deemed to be abrogated by a constitution of the emperors Valentinian, Theodosius, and Arcadius, A. D. 389, Cod. 8, 4, 7. 'Whoever dares to seize by violence things in the possession of the treasury or of private persons without waiting for a judicial order, shall restore possession, and, if he is proprietor, shall forfeit his property, if he is not proprietor, shall forfeit the value.' In accordance with the spirit of this constitution, the dispossessor was no longer allowed to plead the exceptions in the old form of the interdict, and they are omitted in the new form which we find in the Digest: Unde tu illum vi dejecisti aut familia tua dejecit, de eo quaeque ille tunc ibi habuit tantummodo intra annum, post annum de eo quod ad eum qui vi dejecit pervenerit, judicium dabo, Dig. 43, 16, 1. 'The land (or house) whence thou or thy slaves hast violently ejected such a one, and the movables which he had therein, shall be recoverable by action within a year; after the expiration of a year he shall only recover what came into the hands of the dispossessor.' That is to say, the distinction between vis armata and vis quotidiana was no longer recognized. For the difference between the meaning of vis in the interdicts unde vi, uti possidetis, and quod vi aut clam respectively see Windscheid, 1 § 160, n. 5.

Although violence, armed or unarmed, was prohibited to be employed for the recovery of possession even from possessor vitiosus, yet to repel violence by violence in the defence of possession was permitted, Dig. 43, 16, 3, 9. 'An armed aggressor may be lawfully repelled by arms, but this must be immediately, not after an interval, and we may not only resist ejectment, but eject the ejector, provided that no interval has elapsed and it is done forthwith.' Ibid. 17. 'A possessor who is violently ejected and recovers possession immediately by force is understood rather to return to his former position than to possess by violence. Therefore, if I eject you by force, and am immediately ejected by you, and then eject you again, you may have the interdict Unde vi.'

We have seen that Uti possidetis and Utrubi, though called interdicts Retinendae possessionis, were also in effect interdicts Recuperandae possessionis whenever any of the vitia possessionis

was established by the other party: that if the possession of the actual possessor was tainted with one of three vices, if it was acquired from the other party furtively (clam), acquired from him by violence (vi), or held of him by his leave (precario), then his adversary recovered possession. What, then, it may be asked, was the use of a distinct interdict Recuperandae possessionis, the interdict Unde vi, which, like the Uti possidetis, was only available for a year? The answer is, that Uti possidetis could only have the effect of restoring possession when the dispossessor was in present possession; it gave no redress when a third party was the present possessor: in such cases the party dispossessed required a different remedy, and this was given him in the interdict Unde vi, which could be maintained against a dispossessor for damages, whether the latter continued in possession or not. Further, by Uti possidetis the intermediate profits (fructus) were only recoverable from the commencement of the suit, by Unde vi from the time of the ejectment; and the remedy of the dispossessed person by Uti possidetis was barred by the vices of his own possession, not so his remedy by Unde vi, though, as we see by the text, §§ 154, 155, this difference only applied to vis armata, when Gaius wrote.

As violent dispossession was remedied by the interdict Unde vi, so other interdicts remedied dispossession whose inception was clandestine or permissive. An interdict De clandestina possessione seems to be mentioned, Dig. 10, 3, 7, 5, though this more probably refers to a particular application of the interdict Uti possidetis, than to be a special interdict of itself (cf. Lenel, p. 377, n. 7). Such a special interdict would scarcely be required in the case of immovables, for as a possessor was not dispossessed until he had notice of the invasion, he could immediately maintain Uti possidetis, Dig. 41, 2, 6, 1—retinet ergo possessionem qui ad nundinas abiit—or he could by attempting an entry convert the clandestine into a violent dispossession. Nor would it be required for movables, for clandestine dispossession of a movable might be redressed by Utrubi combined, perhaps, with an exhibitory interdict or order of production. Accordingly, it is generally supposed that no special interdict against clandestine dispossession ever existed.

The interdict De precario was in these terms; Quod precario ab illo habes aut dolo malo fecisti, ut desineres habere, qua de re agitur, id illi restituas, Dig. 43, 26, 2, pr. 'The possession of the thing in question which thou holdest by the permission of such a one, or hast fraudulently ceased to hold, do thou restore to him.'

Before we quit this topic we may take the opportunity of considering some of the respects in which the relation called Precarium differed from a closely allied institution, the contract called Commodatum.

(1) Precario rogans (the holder of a thing merely by permission of another) generally had what may be called derivative possession: Commodatarius (the borrower) never had more than detention.

(2) The obligation in Precarium which was not originally regarded as a contract, cf. Sohm, p. 354, n. 5, is purely unilateral and on the side of precario rogans, being simply that he should restore the thing to the person for whom he holds it. Precario dans (the person who allows another to hold property for him) is under no obligation, not even the semi-bilateral obligation for impensae &c., which is incumbent on Commodans (the lender).

(3) Precario rogans is not, like Commodatarius, responsible for diligentia, Dig. 43, 26, 8, 3. Precarium seems at first to have been applicable only to land but afterwards to have been extended to movable property.

At a late period of Roman law Precarium was so far regarded as a contractual obligation that Precario dans could recover by an actio praescriptis verbis, Dig. 43, 26, 2, 2, and 19, 2. Thus Precario dans had two remedies, an action to recover possession (interdictum de precario) and an action on contract: Commodans had only his action on contract; interdicts, as we have stated, not being employed to enforce contracts.

§ 156. Paulus mentioned another kind of interdicta duplicia, namely, those for either acquiring or recovering possession. Sunt interdicta, ut diximus, duplicia tam reciperundae quam apiscendae possessionis, Dig. 43, 1, 2, 3. These are the interdicts, Quem fundum, Quam hereditatem, Quem usumfructum, which have been already quoted, § 89, whereby, if the defendant in a real action refused to give security judicatum solvi, possession was transferred to the plaintiff, who in some cases would acquire, in others recover possession. Quem fundum was the interdict employed in Vindicatio: Quam hereditatem in Hereditatis petitio: Quem usumfructum in the action, claiming an usufruct. In interdict procedure, instituted for the retention of possession, analogous functions were performed by further interdicts called interdicta Secundaria, § 170.

Pending litigation respecting Urban servitudes the plaintiff was protected by a peculiar institution, the interdictum Demolitorium based on Operis novi nuntiatio, the nature of which demands a passing notice. If A, a person entitled to some real right (mortgagee, emphyteuta, superficiarius), was aggrieved by some architectural innovation (aedificatio, demolitio) on the part of B, whereby an urban servitude over the tenement of A was asserted or some urban servitude [jus habendi or jus prohibendi] belonging to A, as owner of a dominant tenement, was violated, A was entitled to serve a formal inhibition or private injunction on B (prohibitio, operis novi nuntiatio) summoning him to desist from the innovation.

On this summons B was bound to desist from his work until he either obtained from the praetor a dissolution or discharge of the summons (remissio, missam facere nuntiationem): or entered into a satisdatio or cautio de demoliendo, security that the structure should be demolished in the event of A as plaintiff succeeding in a future actio Negatoria or Confessoria, i. e. establishing his own jus prohibendi, which would be the same as disproving B's jus aedificandi. If without obtaining such remissio or giving such cautio B persisted in his work, he was compelled to demolish it by the interdictum Demolitorium. If he desisted from the work for the present, but refused to oppose A's suit in the regular course by entering into satisdatio de re defendenda, it was the duty of the judge to compel him to enter into a stipulation that he would not again attempt to build before he established his own jus aedificandi, or disproved A's jus prohibendi, as plaintiff in a suit. This would be actio negatoria of a jus altius non tollendi, if he denied that he was ever under an urban servitude to the tenement of A: actio confessoria of jus altius tollendi, if he affirmed that the servitude was extinguished by usucapio libertatis: or some other actio confessoria, if he claimed a dominant servitude over the tenement of A.

Pending disputes on wrongs relating to land a similar function was discharged by the interdictum Quod vi aut clam. On a prohibitio from a neighbour, who might have a real right or be a mere lessee, prohibitus was obliged to desist from any agricultural innovation (ploughing up pasture, cutting trees, polluting streams, &c.) until he offered security (satisdatio judicio sisti) in any suit in which he might be made defendant, Dig. 43, 24, 3, 5; or proved by way of exceptio his jus faciendi, or by way of Negation disproved his neighbour's jus prohibendi, as plaintiff in some real action or, if the opus was on his own land, in Uti possidetis, Dig. 43, 17, 3, 2. If he persisted in his operation in spite of the prohibitio, or avoided prohibitio by omitting to give notice to the party interested, the interdictum Quod vi aut clam compelled him to efface it and to pay damages for the harm it occasioned.

The interdicts which Gaius calls double are called by Ulpian mixed, Dig. 44, 7, 37, 1. 'Mixed actions are those wherein each party is plaintiff, as the action for determining boundaries, for partition of an inheritance, for partition of joint property, and the interdicts Uti possidetis and Utrubi.' The effect of this duplicity or mixture of characters was that each party was liable to condemnation and absolution. According to Justinian, the three personal actions just named are called Mixed because they involve questions both in rem and in personam, Mixtam causam obtinere videntur, tam in rem quam in personam, Inst. 4, 6, 20. Another effect of the

duplicity of the interdicts was, as we shall presently see, to increase the number of stipulations in the proceeding by Sponsio.

In the system of statute-process (legis actio), Vindicatio is framed in the form of a judicium duplex. The contention of the defendant was not merely a negation of the plaintiff's claim, but also an affirmation of the defendant's claim, a contravindication. Praetor interrogat eum qui cedit an contra vindicet, 2 § 24; cf. 4 § 16. It was not necessary that the cross claims of the parties should be identical in character. On the one side there might be a claim of status, on the other of property, one party vindicating as free the person whom another claimed as slave: or one party vindicating the freedom of a person whom another, as transferee of patria potestas, claimed to be his bondsman (mancipium); or one party asserting the independence (sui juris) of a person whom another claimed as filius familias or as subject to patria potestas, cf. 1 § 134.

Similarly under the legis actio procedure Hereditatis petitio, 3 § 32, comm., would probably be in the form of judicium duplex; for Hereditatis petitio is a species of Vindicatio.

Vindicatio and Hereditatis petitio are related to the actions Communi dividundo and Familiae herciscundae as wholes to parts: the former lay claim to integral ownership and integral succession where the latter merely claim partial ownership and partial succession, Inst. 4, 6, 20. The former became judicia simplicia in the later system of law, while the latter remained judicia duplicia. Ihering, § 52.

In English jurisprudence both parties are said to be equally plaintiffs and equally defendants in the actions called Quare impedit and Replevin.

Uti possidetis was sometimes judicium simplex. We may distinguish three applications of this procedure:

(1) When both parties claim to be in actual possession and one of them is found to be truly in possession without having acquired it from the other by violence, secrecy, or permission. Uti possidetis is then really an interdictum Retinendae possessionis.

(2) When the possession of the actual possessor is found to be vitiated by violence, secrecy, or permission, he is displaced, and the non-possessor is reinstated. Uti possidetis is then in substance and effect interdictum Recuperandae possessionis. In both of these cases it is judicium duplex.

(3) Uti possidetis might further be brought against a defendant who made no contention that he himself was or ought to be in possession, but who was guilty of some disturbance or molestation of the possessor; e. g. by prohibitio: Qui colere fundum prohibetur, possidere prohibetur, Dig. 43, 17, 3, 4. Eum qui aedificare pro-

hibeatur, possidere quoque prohiberi manifestum est, Dig. 41, 2, 52, 1. Etenim videris mihi possessionis controversiam facere, qui prohibes me uti mea possessione, Dig. 43, 17, 3, 2.

Savigny holds that No. (3) was the original application of Uti possidetis; and that Nos. (1) and (2) were subsequent extensions of its employment and due to jurisprudence, i. e. the ingenuity of the jurists: the reverse is the prevalent doctrine, Baron, § 120.

§ 163. The formula arbitraria in Unde vi must have contained the clause, Unless the defendant obey the judge's order of restitution; the rest is uncertain. The analogy of the other interdicts suggests something to the following effect: If it appear that the defendant has disobeyed the praetor's order to reinstate the plaintiff, then, unless the defendant comply with the judge's order of restitution, do thou, judge, condemn him in all the damages the plaintiff shall have sustained.

The mode of restitution would be prescribed by the judex, who would probably require the restitution of all movables that had been removed, though these were not mentioned in the original form of the interdict, § 154.

The jurists who considered that a defendant who desired a formula arbitraria was guilty by confession of the delict laid to his charge, must have supposed that the only function of the judex in this case was assessment of damages (litis aestimatio), Dig. 9, 2, 25, 2.

§ 165. Huschke (Stud. des röm. Rechts. § 11) supposes that the sponsio on Quorum bonorum was of the following form: If the praetor Quintus Caepio in accordance with his edict has granted me possession of the goods left by Turpilia, and if in contravention of his edict thou hast not restored to me the portion of those goods which thou possessest as heir or as occupant, or hast fraudulently ceased to possess; dost thou promise to pay me such and such a sum? I promise. Cic. ad Fam. 7, 21 . . . sponsionem illam nos sine periculo facere posse; 'Si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dedit.' (Cf. Lenel, § 227, and p. 359.)

The stricti juris action based on this sponsio would be followed by another, which was doubtless called judicium Secutorium, § 166 *a*. The latter would probably contain an intentio in factum concepta, of the form: Si Aulus Agerius Numerium Negidium sponsione vicit, and a formula arbitraria such as that already described for the non-penal procedure: Ni Numerius Negidius Aulo Agerio bona illa judicis arbitrio restituat, quanti ea res erit, judex Numerium Negidium Aulo Agerio condemna.

After the first appearance before the praetor (in jus vocatio) and the issue of the interdict (interdictum redditum or editum) it would be necessary to wait a certain time to see whether it was obeyed or

disobeyed by the defendant; and if it was disobeyed, there would be at any time within the period of a year a second in jus vocatio, or at least a reappearance in jure secured by a vadimonium which the parties entered into at the time of their first appearance, for the nomination of the judex and the delivery of the formula arbitraria, if the procedure was non-penal; or for the sponsio and delivery of the formulas of action on the sponsio and the judicium secutorium, if the procedure was penal.

The interdict or command of the magistrate, like the law or command of the legislator, has two members (protasis or minor premiss, and apodosis or conclusion); or two terms, an antecedent (a title expressed by the middle term B) and a consequent (an obligation expressed by the major term A). The antecedent term is usually introduced by a relative (*Quorum* bonorum, *Unde* dejecisti, *Uti* possidetis, &c.) equivalent to a *Si*: accordingly any interdict may be paraphrased by the proposition: If such and such antecedent title [B, middle term] exists, then thou [C, minor term] art under such and such consequent obligation [A, major term]: and this antecedent, simple as it may appear, is usually analysable into a variety of conditions. Thus in Quorum bonorum the antecedent clause and question for the judex is not only whether certain goods are detained by the defendant, but also whether the plaintiff had obtained a grant of possession of these goods, whether such grant was rightfully obtained, and in accordance with the provisions of the edict, &c.

§ 166. From the two sponsiones and two restipulationes which are mentioned, it appears that Gaius is now speaking of double interdicts, and from the words eum fundum easve aedes, § 166 *a*, it appears that he is speaking not of Utrubi but of Uti possidetis.

After a first in jus vocatio in which an interdict Uti possidetis had been obtained, there took place, by prearrangement, a molestation of one of the litigants by the other. In the disorderly beginnings of society this molestation was doubtless often in reality a turbulent defiance of the magisterial interdict: but in more orderly periods both parties would be desirous of trying their right by legal course, and the steps taken by both would be prearranged with a view of satisfying the conditions of interdict procedure (vis ex conventu). So a trespass, or at least an act that contains many of the elements of a trespass, is often arranged to be committed for the purpose of enabling parties to try a right before English tribunals. Cf. §§ 166, 170; Cic. pro Caec. 1, 7, 8, 10, 11; pro Tull. 8; Roby, App. D, p. 515.

It is probable that the lacuna preceding this paragraph contained an explanation of vis ex conventu and of other parts of the procedure in interdicta duplicia.

After the vis ex conventu had been simulated, there took place

a second in jus vocatio, or reappearance in jure in pursuance of the vadimonium, at which the parties entered into five different stipulations.

Just as interdict procedure was necessary in order to determine which litigant should have interim possession pending the vindicatio, so it was necessary to determine who should have interim possession pending a possibly protracted interdict procedure. This was accomplished by means of Fructus licitatio, which took place in the second appearance before the praetor, and was followed by either (*a*) the Fructuaria stipulatio, or satisdatio judicatum solvi.

Each party then wagered a penal sum in two characters, for each party was both plaintiff and defendant: and, as a sponsio was a unilateral contract, in order to produce a bilateral contract, that is, to bind both parties and constitute a single bet or wager in the modern sense of the term, it was necessary to have two stipulations, that is, a sponsio and a restipulatio. For the purpose, therefore, of making two wagers the parties entered into four stipulations (two sponsions and two restipulations); i. e. (*b*) one sponsio and (*c*) one restipulatio in which a litigant was promisor and promisee as plaintiff, and (*d*) a second sponsio and (*e*) a second restipulatio in which he was promisor and promisee as defendant. The sponsio would be a stipulation to the following effect: Si adversus edictum praetoris possidenti mihi vis a te facta est, tot nummos dare spondes? Spondeo: the restipulatio to the following effect: Si adversus edictum praetoris possidenti tibi vis a me facta non est, tot nummos dare spondes? Spondeo. Thereby each party would be bound to pay, or entitled to receive, two penal sums, according as the actions brought on these four stipulations decided the issue which the stipulations raised.

A judex was then appointed who tried the four actions.

Then if the victor in the four actions had not been the higher bidder at the Licitatio, the judex decided a fifth and sixth action: namely one called judicium Secutorium or Cascellianum, which had a formula arbitraria, and whereby possession of the movable or immovable and its fruits was recovered from the higher bidder; and another on (*a*) the Fructuaria stipulatio, to recover from the higher bidder a penal sum equal to the value of the fructus.

Instead of suing on (*a*) the Fructuaria stipulatio the victor had the option of bringing judicium Secutorium for the recovery of this penal sum, and then he was protected against the event of his opponent's insolvency by sureties (satisdatio). It may be asked what compensating disadvantage of this course should ever induce the victor to sue on (*a*) Fructuaria stipulatio. Perhaps, as Krueger suggests, if he sued for the penal sum by Secutorium with satisdatio, then when he

brought Cascellianum he only recovered the Res without the interim fructus. The satisdatio would thus increase his certainty of obtaining the amount of the penal sum, but would diminish by the value of the fructus the total amount recovered.

Corresponding to the penal sum incurred by Fructus licitatio, and secured by (*a*) Fructuaria stipulatio or Satisdatio of the litigant who obtains possession pending interdict procedure, was the liability in twice the value of the fructus incurred by the litigant who obtained possession by Vindiciae dicendae pending statute-process. Such at least appears to be the import of a partly conjectural fragment of the Twelve Tables (Tab. 12, 3): Si vindiciam falsam tulit, si velit is . . . tor arbitros tris dato, eorum arbitrio . . . fructus duplione damnum decidito. Festus. 'When temporary possession has been wrongfully obtained (the question of property and the value of the fruits of possession) may be decided by three arbiters, by whose arbitration the wrongful possessor shall pay as a penalty twice the value of the fruits of possession to the true proprietor.'

§ 170. From this paragraph it appears that as in Real actions the defendant who declined to give satisdatio judicatum solvi and thus impeded the process of the action was deprived of possession by the interdicts Quem fundum, Quam hereditatem, Quem usumfructum, § 156, comm.; so a suitor whose contumacious refusal to take the regular steps prevented interdict procedure from accomplishing its normal course was deprived of possession by interdicta Secundaria.

The mention of VIS (qui VIM non faciet) shows that, subsequent to the issue of the interdict and antecedent to further proceedings, one act of the forensic drama was a conventional ejectment (vis ex conventu), cf. § 166, comm.; which has been identified by some writers with what is called Deductio quae moribus fit in suits by Sponsio, and perhaps with the Manuum consertio in Sacramentum, § 88, comm., § 13, comm.

The inquiry into the nature of POSSESSION has been purposely postponed hitherto in order not to interrupt the exposition by Gaius of the details of the possessory interdicts (Utrubi, Uti possidetis, Unde vi); i. e. those interdicts in which the mere fact of possession is itself a title to the continuance or restoration of possession (as to the nature of possession cf. Sohm, § 67).

Possession may be defined as a relation which consists of two elements; Detention, or physical power over a thing, exercised either by oneself or by some other person as one's representative, e. g. by depositarius or commodatarius for depositor or commodator, and Animus domini, a certain intention on the part of the person in possession, the intention of holding it against others as a proprietor would, and so of deriving from it the benefits of ownership.

Theophilus, the colleague of Tribonian and author of the Greek version of Justinian's Institutes, says: νέμεσθαί ἐστι τὸ ψυχῇ δεσπόζοντος κατέχειν, 3, 39, 2. The meaning of this definition will best appear from an examination of the instances in which according to the jurists Possession does or does not exist; and in particular from the contrast of the cases where Possession is present with those where Detention, i. e. mere physical control for another, the right of excluding others belonging to him, is present but Possession, which is protected by possessory interdicts, is absent, as e. g. in the case of depositarius or commodatarius. Thus Possession in the sense in which we are using it is equivalent to juristic Possession.

Possession in this sense, as opposed to mere Detention, is called Possessio civilis, or simply Possessio.

Mere detention is called Possessio naturalis, corporaliter, Naturaliter tenere, In possessione esse. (For various meanings of the terms Possessio civilis—naturalis cf. Windscheid, Pand. 1 § 148, n. 12. Dernburg, Pand. 1 § 175.)

Juristic possession (jus possessionis) does not depend on a legal title to possess (jus possidendi) like ownership, but simply on the fact of a man's having actual control of a thing with the intention of maintaining it. 'Hujus autem interdicti (uti Possidetis) proponendi causa haec fuit, quod separata esse debet possessio a proprietate; fieri etenim potest, ut alter possessor sit, dominus non sit, alter dominus quidem sit, possessor vero non sit; fieri potest, ut et possessor idem et dominus sit.' Dig. 43, 17, 1, 2. Hence as far as the possessory interdicts are concerned the law is indifferent whether the possession is that of an owner or of a bona fide, or even that of a mala fide possessor. But it is to be remembered at the same time that these interdicts do not in any way shut out the owner who has a right to possession from asserting his claim by vindicatio.

The characteristic of possessio civilis is the combination of physical control with the Animus domini: but in certain singular or abnormal instances we shall find that this differentia is wanting, and physical control or detention in the name of another (alieno nomine), i. e. possessio naturalis, is treated as juristic possession, e. g. in the case of pledgee or mortgagee.

Possession accompanied with certain other extraneous conditions, namely Titulus, Bona fides, and the absence of furtum, is transformed by a certain lapse of time into ownership; and is called Usucapion-possession, 2 §§ 40–61, comm. Our present purpose is with Possession apart from these foreign elements: the Possession which, as protected by Utrubi, Uti possidetis, and Unde vi, is often called Interdict-possession.

The slave and filiusfamilias were incapable of juristic possession.

Quod ex justa causa corporaliter a servo tenetur, id in peculio servi est et peculium, quod servus civiliter quidem possidere non posset sed naturaliter tenet, dominus creditur possidere, Dig. 41, 2, 24. 'When a slave has corporeal control of a thing originating from some legal cause, the thing is in his peculium, and this peculium which he cannot have juristic possession of, though he holds it in fact, his master has possession of.' Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis, sed et juris est, Dig. 41, 2, 49, 1. 'A person under power is able to keep under his actual control a thing belonging to his peculium, but not to possess it, for the conditions of possession are not purely physical, but partly legal;' i. e. possession is not mere physical detention, but detention by a person who is regarded by law as being capable of possessing. In respect of this incapacity of filiusfamilias we must except the peculium castrense and quasi-castrense. Filiusfamilias et maxime miles in castris adquisitum usucapiet, Dig. 41, 3, 4, 1. 'What a filiusfamilias and particularly what as a soldier he acquires in the field is converted by usucapion-possession into ownership.'

A manager or agent (procurator) has detention, not possession. Nec idem est possidere et alieno nomine possidere; nam possidet cujus nomine possidetur; procurator alienae possessioni praestat ministerium, Dig. 41, 2, 18, pr. 'Possession differs from detention in the name of another, for he has possession of a thing in whose name it is held by another. An agent is the instrument of another person's possession.' Generaliter quisquis omnino nostro nomine sit in possessione, veluti procurator, hospes, amicus, nos possidere videmur, Dig. 41, 2, 9. 'The detention of a thing by another entirely for us as that of a procurator, guest, or friend is our possession.' Cf. 2 § 95. Inst. 2, 9, 5.

A borrower (commodatarius) has only detention, the lender (commodator) retains possession. Rei commodatae et possessionem et proprietatem retinemus, Dig. 13, 6, 8.

A hirer (conductor) has only detention, the letter (locator) possession. Et fructuarius, et colonus, et inquilinus sunt in praedio et tamen non possident, Dig. 43, 26, 6, 2. 'The usufructuary, hirer of land, and lodger have occupation, but not possession.' Per colonos et inquilinos aut servos nostros possidemus, Dig. 41, 2, 25, 1. 'Our farmers, lodgers, and slaves are instruments of our possession.'

The Emphyteuta, as is thought by most modern writers, though a contrary opinion is held by Windscheid (1 § 15, 4, n. 7) and others, had possession. For the nature of Emphyteusis cf. 3 § 145, comm. The emphyteuta had a jus in re nearly amounting to ownership, for he could recover the land by actio vectigalis in rem, which was analogous to vindicatio from any possessor and, as long as he paid

his rent (vectigal) he was irremovable. The real right of the emphyteuta must not, however, be confounded with his possession, for, like ownership and possession, they are two distinct legal relations, the one being protected by the actio in rem, the other by a possessory interdict. The dominus probably retained usucapion-possession by means of the tenant.

The mortgagor or pledgor had usucapion-possession, the mortgagee or pledgee had interdict-possession. Qui pignori dedit ad usucapionem tantum possidet; quod ad reliquas omnes causas pertinet, qui accepit possidet, Dig. 41, 3, 16. The mortgagee could recover the pledge by actio in rem quasi Serviana or hypothecaria, Inst. 4, 6, 7. But this is the action by which the real right of the mortgagee or pledgee is asserted, which must be distinguished from the possessory interdict by which his possession is protected. Thus instead of identifying the mortgagee's jus in re and his interdict-possession, it is correct to regard his jus in re and his interdict-possession as distinct though possibly concurrent. In a hypotheca, indeed, which is an agreement establishing a jus in re without delivery, the mortgagee or pledgee acquired no possession. The usucapion-possession attached to the mortgagor or pledgor by means of the mortgagee or pledgee if possession was transferred, and this was in the interest of the mortgagee or pledgee, whose security against third persons would be strengthened through the consequent acquisition of ownership by the mortgagor or pledgor.

The depositary has mere detention, the depositor retaining his interdict-possession. The depositary only acquires possession in one case, that is, when he is made a stake-holder for this very purpose. Dig. 16, 3, 17, 1. 'Not only the property but also the possession of the thing deposited remains with the depositor, except when a thing is deposited with a stake-holder (sequester) not simply for safe custody: for in this case the sequestrator possesses, the object being to prevent the time of usucapion from proceeding.' It seems, then, that in such Sequestration the interim usucapion-possession cannot be counted by the victor in the suit, Dig. 41, 2, 39.

With Permissive holding of a thing (precarium) possession passes, unless it is expressly agreed that only detention shall pass. Meminisse autem nos oportet, eum qui precario habet etiam possidere, Dig. 43, 26, 4, 1. 'We must remember that the holder of a thing by permission has possession.' Is qui rogavit, ut precario in fundo moretur, non possidet, sed possessio apud eum qui concessit remanet, Dig. 43, 26, 6, 2. 'He who has asked to be allowed to remain on land merely at the will of the owner does not possess, but possession remains with the grantor.' The grantor always retained usucapion-possession, Dig. 43, 26, 15, 4.

The person in the enjoyment of a personal servitude has no possession. Usufructuarius usucapere servum non potest, primum quia non possidet, Dig. 41, 1, 10, 5. 'The usufructuary cannot acquire the slave by usucapion, in the first place because he has no possession.' Naturaliter videtur possidere is qui usumfructum habet, Dig. 41, 2, 12, pr. 'The usufructuary seems to have only natural, not juristic possession.'

[It would be a fallacy to argue that detention is possession because it is naturalis possessio, just as it would be to argue that nine is ten because it is ten minus one, for an epithet sometimes detracts from, instead of adding to, the connotation of a word.]

As the usufructuary has no possession, it follows a fortiori that the usuary has no possession. [Although the jus in re called usus must be distinguished from possession, the words usucapio, usurpatio show that in the older language usus = possessio.]

Servitudes, though not the subject of possession, yet as res incorporales, were the subject of quasi-possession, § 139, e. g. Qui fundi possessionem vel ususfructus quasi possessionem amisit, Dig. 4, 6, 23, 2; Si quis diuturno usu et longa quasi possessione jus aquae ducendae nactus sit, Dig. 8, 5, 10, pr.: which was called juris possessio in contradiction to true possession or corporis possessio; Qui possessionem vel corporis vel juris adeptus est, Dig. 43, 26, 2, 3: though if juris possessio was the proper name for possession of a fraction of property, possession that bore the same relation to the totality of property should have been called, not corporis possessio, but dominii possessio.

The quasi-possession of servitudes, which consists in the actual enjoyment of the right, whether under a valid title or not, like the possession of corporeal things, was protected by interdicts. The quasi-possession of rural servitudes, such as iter, actus, via, jus aquae ducendae, &c., was protected by special interdicts: e. g. Quo itinere actuque privato, quo de agitur, vel via hoc anno nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto, Dig. 43, 19, 1, pr. 'The foot-way, horse-way, carriage-way in question, which thou hast used within a year without having done so by violence, or clandestinely, or by permission in respect of the opposite party, the violent hindrance of thy continuing to use them I prohibit.'

Urbane servitudes, whether positive, as jus tigni immittendi, or negative, as jus altius non tollendi, being closely connected with possession of an immovable, according to Savigny, were always protected by Uti possidetis: according to Vangerow, the protection of the status quo was always by interdictum Quod vi aut clam or Operis novi nuntiatio, § 355. Personal servitudes, e. g. ususfructus, usus, fructus, were protected, according to circumstances, by Uti

possidetis, Utrubi, or Unde vi, with a special differentiation, which constituted them interdicta *utilia*, Vat. fr. 90.

Four of the cases we have mentioned, the possession of the emphyteuta, the mortgagee, the sequestrator, and the permissive holder, are generally regarded as anomalous; for possession is composed of two elements, physical detention and the intention of holding the property as owner (animus domini), and none of these four possessors can be said to have the animus domini. In these four cases, and these alone, it is necessary to assume that the law recognized a derivative or transferred possession, in which one of the elements of original possession, the animus domini, is absent, and replaced by what may be called the animus alienam possessionem exercendi. (For a different view of the animus required as an element of possession, which is applicable in all cases alike, see Sohm, § 67, n. 3.)

In three of the above-mentioned cases usucapion-possession remained with the person from whom the interdict-possession was derived (the person from whom the emphyteusis was held, the mortgagor or pledgor, the person who allowed the thing to be held precariously), and only interdict-possession passed to the derivative possessor (the emphyteuta, the mortgagee or pledgee, the person allowed to hold the thing precariously). In all the four cases (including Sequestration) the dominus lost the protection of the interdicts Retinendae possessionis, which were transferred to the derivative possessors. The grantor of precarious tenancy was also protected by the interdict De precario, an interdict Recuperandae possessionis.

The Superficiarius (holder of a Real right (jus in re) in a house of which the owner of the ground is proprietor, e.g. a person who with permission of the landowner has built out of his own materials a house on and therefore belonging to another person's land, 'quod inaedificatur solo solo cedit') has, according to Savigny, only juris quasi-possessio: but this is inconsistent with the fact that he is protected by the interdicts Unde vi and De precario, Dig. 43, 16, 1, 5. According to Vangerow he has Derivative possession like the four above-mentioned: but this is inconsistent with the fact that he is protected by the special interdict De superficiebus, while the owner of the soil retains the protection of Uti possidetis, Dig. 43, 17, 3, 7, which in Derivative possession is transferred to the Derivative possessor. The true doctrine, then, appears to be that Superficiarius has Original possession of the house, though the landlord has possession of the soil, Baron, § 183 (but cf. on this very difficult subject Windscheid, 1 § 154, n. 7). Superficies as a real right would be vindicated by a special formula in factum concepta, which must be distinguished from the possessory remedy—the interdictum de superficiebus—Ait praetor: Uti ex lege locationis sive conductionis super-

ficie, qua de agitur, nec vi nec clam nec precario alter ab altero fruimini, quo minus ita fruimini, vim furi veto. Si qua alia actio de superficie postulabitur causa cognita dabo. Savigny, 5, p. 81. Lenel, § 249.

As possession consists of two elements, one corporeal and one mental, it is evident that it cannot be acquired by a purely mental act. Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore, Dig. 41, 2, 3, 1. 'We acquire possession by the conjunction of a corporeal and a mental act, and not by either separately.' Neratius et Proculus et solo animo non posse nos adquirere possessionem aiunt, si non antecedat naturalis possessio, Ibid. 3. 'Intention alone does not suffice for acquiring juristic possession unless preceded by natural possession or detention.' Detention necessarily implies not corporeal contact, but corporeal control, and is the physical power of dealing with a subject as owner and excluding any one else. The acquisition of detention consists in the fact of obtaining this power which is never by a fictitious or symbolical act, but by a real physical change of relation. The continuance of possession requires a continuance of both the elements, which are essential to its acquisition, that is, both physical control and the intention of enjoying as owner, or at least on one's own account. Fere quibuscumque modis obligamur, isdem in contrarium actis liberamur, cum quibus modis adquirimus, isdem in contrarium actis amittimus. Ut igitur nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque (utrumque = alterutrum, or read utcunque or utrumcunque) in contrarium actum est, Dig. 50, 17, 153. 'As obligation is dissolved by a reversal of the conditions under which it is created, so possession is lost by a reversal of the conditions under which it is acquired. As its acquisition demands the concurrence of a corporeal and a mental condition, so its termination requires the reversal of one or the other.' Ejus quidem quod corpore nostro teneremus [dicam] possessionem amitti vel animo vel etiam corpore, Dig. 41, 2, 44, 1. 'When we detain in person, possession may be terminated by either a mental or a physical change.' Windscheid, 1 § 156, n. 2.

The physical condition, however, is not to be interpreted so strictly in the continuance of possession as in its commencement; for continued possession permits a temporary suspension of physical control, and only requires the power of reproducing this relation at will: for instance, it is not lost if we have left a thing unintentionally in a forest, but remember the exact spot; or have stowed a thing in a place of security, but forgot for the moment where we put it; or abandon an Alpine pasture in winter, with the intention of revisiting it on the return of summer, Dig. 41, 2, 3, 13. 'Nerva the son is of opinion that the possession of movables, excepting

slaves, only lasts so long as they are in our custody, that is so long as we have power of obtaining natural possession or detention of them.' There was an exception in the case of slaves, for a slave while he was a fugitive was regarded as still in his master's possession, and in the case of land, for a man did not lose possession of his land which had been invaded in his absence until he had notice of the invasion; that is to say, he retained possession in the interim solely by his mental disposition. Nam saltus hibernos et aestivos, quorum possessio retinetur animo, licet neque servum neque colonum ibi habeamus, quamvis saltus proposito possidendi fuerit alius ingressus, tamdiu priorem possidere dictum est, quamdiu possessionem ab alio occupatam ignoraret, Dig. 41, 2, 44, 2, 45, 46. 'When a winter or summer pasture, retained in possession without the instrumentality of slaves or tenants, solely by the mental relation, is invaded by a stranger who has the intention of taking possession of it, the prior possessor is not regarded as ejected from possession until he has notice of the invasion. It is by reference to this laxer interpretation and to these exceptions that we can understand the opinion mentioned by Gaius, § 153, that possession may be retained without a continuance of corporeal detention.

A guardian acting alone may of course acquire possession for an infant ward, that is, a child under the age of seven. But what is peculiar is that an infans, who is generally incapable of performing any legal act, is able, it would seem, also to acquire possession for himself, and this even without the sanction of his tutor in the case of a gift, though requiring his sanction in other cases. Dig, 41, 2, 22, 2; Cod. 7, 32, 3. In other matters, as we have seen, tutoris auctoritas could only be given to a child infantia major, i.e. after completion of seven years of age.

The possessor of a whole or a substance formed by the combination of various parts (universitas rerum distantium) does not separately possess with intention of ownership the various elements of which it is composed. If, then, a man begins by possessing the whole and completes the usucapion of the whole before its dissolution into its component parts, the result will depend on the question whether all the parts belonged to the original proprietor of the whole or some of them belonged to a third person. If some of the materials belonged to a third proprietor, then, as these have not been separately possessed during the period of combination, the usucapion of them only begins to run after the dissolution of the whole, Dig. 6, 1, 23, 7; Dig. 41, 1, 7, 11. This rule is not a singularity of timber (Dig. 47, 3), but applies to all materials that have been combined into a whole, whether movable, e.g. a flock of sheep, or immovable.

If all the materials belonged to the owner of the whole, then he who acquires by usucapion the whole is owner of all the materials if they are subsequently separated, just as he would be if he had acquired property in the whole by tradition or any other valid form of alienation from the original proprietor.

If the dissolution of the whole precedes the completion of usucapion, then the usucapion of the separate materials has to begin ab initio, Dig. 41, 3, 23, pr. Thus, if a man has possessed a house for nine years and six months, he will complete its usucapion or prescription in another four months according to the law of Justinian: but if any of the materials (windows, doors, columns, tiles) are separated, he will require three years to acquire them by usucapion as movables.

If, on the contrary, a person begins by possessing the materials separately and after a time combines them into a whole, the question whether his usucapion of the materials continues to run depends on the principles which govern the *loss* of possession. Possession is not lost by the absence of animus possidendi, but by a positive animus non possidendi. As this cannot here be alleged to exist, the usucapion of the materials will continue to run in spite of their combination and will be completed as soon as if they had remained separate, Dig. 41, 3, 30, 1. An exception is produced by the prohibition of the Twelve Tables to sue for building materials as long as they form a portion of a house (tignum junctum aedibus, Dig. 47, 3, 1, pr.): for, as agere non valenti non currit praescriptio, § 110, comm., the usucapion of the timber must be suspended until the house from any cause is demolished. Inst. 2, 1, 29. Vangerow, § 204.

Having passed in review the nature of Possession and the form of the Possessory interdicts, we may now examine the often mooted question what is the relation of Possession to the classification of Rights as Real or Personal: to which division of actions, Real or Personal, is procedure by the Possessory interdicts to be assimilated?

The answer to this must begin by distinguishing mere Possession or Interdict-possession, from Possession associated with Titulus, Bona fides, absence of furtum, that is from Usucapion-possession. The latter is incipient property, and is recoverable by actio in rem Publiciana, 2 § 41; that is, it is treated in respect of its remedy as if it were perfect property in respect of all persons except the owner: Usucapion-possession, then, though it is always liable to be defeated by the owner making good his superior claim (except in the case of the possessor having a bonitary title), may be regarded as a Real right and is recoverable from third parties by a Real action.

All interdict procedure belongs to the class of Personal actions

for the enforcement of obligations, Modestinus, Dig. 44, 7, 52, 6. Jure honorario obligamur ex his, quae edicto perpetuo vel magistratu fieri praecipiuntur vel fieri prohibentur. Interdicta omnia, licet in rem videantur concepta, vi tamen ipsa personalia sunt, Ulpian, Dig. 43, 1, 3. 'All interdicts, though impersonal (Real) in terms, are in substance Personal actions.'

The party against whom judgment was given in interdict procedure was, it would seem, technically guilty of having disobeyed the mandate contained in the interdict of the magistrate. Interdict procedure, which was carried on by means of a sponsio poenalis, has in some respects more similarity to a delictal than to a strictly civil action. That some interdicts in particular (interdictum fraudatorium, interdictum de vi, and Unde vi) were classed with actions ex delicto, appears from the fact that they were only maintainable against the wrong-doer within a year from their nativity, though originally this was otherwise in the case of the interdictum de vi armata, Cic. ad Fam. 15, 16; and were only maintainable against the heir of the wrong-doer so far as he was enriched by the wrong of his predecessor (quatenus ad eum pervenit . . . ut tamen lucrum ei extorqueatur, Dig. 44, 7, 35, pr.), features which the interdicts have in common with other unilaterally penal actions. Moreover, the interdicta retinendae possessionis appear to have been based, as we have seen, on an act of feigned violence (vis ex conventu), that is on an act of a delictal kind.

The right of a person who has been dispossessed to be reinstated in possession is a secondary right based on the violation of some primary right. What was the nature of that primary right? According to Savigny it was the right of a freeman to be exempt from violence or corporeal molestation; not the right of a mere possessor to continue in possession till the owner has vindicated his right. He denies, that is, that the mere fact of Possession can give a title investing the possessor who, it is to be remembered, may even be a thief or other malâ fide possessor, with a right to continue in possession; and bases the right of reinstatement on another right, one of the rights that we have called Primordial, the right to immunity from corporeal violence. But the more prevalent view now is that the object of the possessory interdicts, whatever may be their formal character, is to afford fuller protection to ownership, as it is the owner who is, as a rule, in possession, and if he is disturbed in it he finds proof of his possession, which is all that the interdicts require—a much easier task than proof of ownership, which is proverbially difficult. This advantage, however, cannot be given him, unless it is also extended to the possessor who is not owner, and even to the malâ fide possessor, since otherwise the question of proof of title would not be avoided.

According to this theory then possession is to be regarded as conferring a right against the person interfering with it ancillary to that of ownership. Cf. Ihering, Ueber den Grund des Besitzesschutzes; Sohm, § 67.

The classical jurists seem not to have considered the question. The delict adjudicated upon in interdict procedure is in form the violation of a public duty, the duty of obedience to the magistrate. That it was in substance the violation of a private or civil right of a person who has been dispossessed did not appear on the face of the proceedings; and consequently the nature of this right had not to be investigated.

Possession, which involves a right against the world to freedom from molestation till a better right is shown, came to be regarded by the Roman jurists and in subsequent legal history as de facto ownership standing alongside and in close relationship to legal ownership. So the contrast between the possessory interdicts and vindicatio reminds Englishmen of the old division of actions in English law into Possessory and Droitural, which our mediaeval lawyers adopted from the Civil and Canon Law. According to this view the Interdicts Uti Possidetis and Utrubi were, at least at the time when Gaius wrote, not delictal, except in form, but possessory in character, the infringement of the rights they protected wanting the ordinary requisites of a delict. But though the possessory interdicts seem to have for their object simply the protection of possession, as the object of vindicatio is simply the protection of ownership, they are actions in personam not in rem, that is they only lie against the party who immediately interferes with the possession of another, not against third parties.

The primary right on which they are founded cannot be better stated than in the words—'possessor hoc ipso, quod possessor est, plus juris habet, quam ille, qui non possidet.' The law assumes that the possessor is owner till the contrary is proved in an appropriate action. Cf. Bruns, Die Besitzklagen des römischen und heutigen Rechts.

That in a given system of positive law what is in substance an action for the protection of property may assume the form of an action on Delict, we may convince ourselves by remembering some of the anomalies of the scheme of actions in English law. Trover and Detinue, which were brought to recover movable property, were kinds of Trespass, that is of action on delict: Assumpsit, the remedy for enforcing a simple contract, was externally a species of Trespass on the Case, another action on delict: and Ejectment, practically the sole real action for the recovery of land, was theoretically another species of Trespass.

The Interdict, as originating action, bears some resemblance to a now abolished institution of English law, the Original writ. But

the Original writ was a mandate addressed by the head of administration or judicature to the sheriff; that is, to an executive officer, not, as the interdict, to the individual suitor. Besides, this mandate of the crown required the sheriff to command a defendant to obey the crown by obeying the precepts of the legislator: the peculiarity of the interdict, as appears from the preceding account of its character, was that it formed of itself the whole of the law which the suitor was commanded to obey. The possessory interdicts, for instance, simple and meagre as they outwardly seemed, really comprised the whole law that governed the protection of mere Possession. And the same is true of all the other interdicts which have been enumerated, so that the interdicts had the effect of giving protection to rights outside the ordinary law, through the direct interposition of the magistrate. This, as already observed, is apparently the true interpretation of the terms in which Gaius expresses the distinctive feature of Interdicts: certis ex causis Praetor aut Proconsul PRINCIPALITER auctoritatem suam finiendis controversiis interponit, § 139: i. e. in issuing an interdict the magistrate exercised a principalis auctoritas, wielded a sovereign authority.

But though originally the subjects of the Interdict had been omitted by the ordinary law, as matters rather of administration than of legislation; yet after many individual Interdicts had been issued, and their conditions had been generalized by the authorities of jurisprudence; after, moreover, the rules which would be observed in their issue had been announced by the magistrate in his annual proclamation; the area of questions decided by Interdict was practically as much subject to law as any other department of Roman life. The code of rules promulgated by the magistrate (jus praetorium), being accepted by the state, was just as much law as if it had been enacted by the legislative assemblies: so that finally Interdict procedure differed from ordinary litigation merely by a fringe of form, that served as a memento of its historic origin, the extraordinary power of the magistrate in republican Rome: this fringe of form disappeared with the formulary process, the procedure in the domain once managed by Interdict being assimilated to the procedure employed in all the other departments of the code; thus Justinian finds it unnecessary to speak in his Institutes of the old forms of Interdict procedure. Inst. 4, 15, 8.

§ 171. ——*Modo* | pecuniaria poena modo iurisiurand*i* religione — | —; eaque praetor —— | —— aduersus in*fitiantes ex quibusdam* causis dupl*i* actio constituitur, ueluti si iu-

§ 171. We have now to notice that in order to prevent vexatious litigation, both plaintiffs and defendants are restrained sometimes by pecuniary penalties, sometimes by the sanction of an oath which they are compelled to take, some-

dicati aut depensi aut damni iniuriae aut legatorum per damnationem relict*or*um nomine agitur; ex quibusdam causis sponsionem facere permittitur, ueluti de pecunia certa credita et pecunia constituta; sed cert*ae* quidem creditae pecuniae tertiae partis, constitutae uero pecuniae partis dimidiae.
Inst. 4, 16, pr.

times by fear of suffering infamy. The defendant's denial of his obligation is in certain cases punished by the duplication of the damages to be recovered. This occurs in an action on a judgment debt, or for money paid by a sponsor (depensi), or for unlawful damage to property (damni injuriae), or for legacies left in the form per damnationem. Sometimes a wager of a penal sum is permitted, as in an action of loan of money, or on a promise to pay a preexisting money debt (pecunia constituta), in the former case of one third of the sum in dispute, in the latter of one half.

§ 172. Quodsi neque sponsionis neque dupli actionis periculum ei cum quo agitur *i*niungatur, ac ne statim quidem ab initio pluris quam simpli sit actio, permittit praetor ius*i*urandum exigere NON CALVMNIAE CAVS*A* INFITIAS IRE. unde quamuis heredes uel qui heredum loco ha|bentur, —— obligati s*i*nt, item femin*ae* pupill*i*|que ex*imantur* periculo sponsionis, iubet tamen eos iurare. Inst. 4, 16, 1.

§ 172. In the absence of the risk of a penal wager, or of duplication of damages on account of denial, and when the action is not one which apart from any denial entails more than simple damages, the plaintiff is allowed by the Praetor to exact an oath from the defendant that his denial is not vexatious. Accordingly, although heirs and those in the position of heirs are always exempt from penalty, and women and wards are exempted from the risk of the penal wager, still the Praetor requires them to take the oath that they are not proceeding vexatiously.

§ 173. Statim aut*em* ab initio pluris quam simpli actio est ueluti furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli. nam ex his causis et aliis quibusdam, siue quis neg*e*t siue fateatur, pluris quam simpli est actio.
Inst. l. c.

§ 173. But apart from any denial, more than simple damages are involved in various actions: as in an action of manifest theft for a fourfold penalty, for theft not manifest for a twofold one, for stolen goods being discovered or introduced (concepti et oblati) a threefold penalty: for in these and some other cases the action is for something more than mere damages, whether the plaintiff denies or confesses the claim.

§ 174. Actoris quoque calumni*a* coercetur modo calumniae

§ 174. Vexatious litigation (calumnia) on the part of the plaintiff

iudicio, modo contrario, modo iureiurando, modo restipulatione. Inst. l. c.

is also checked sometimes by the judicium calumniae, sometimes by the Contrary action, sometimes by oath, and sometimes by restipulation.

§ 175. Et quidem calumniae iudicium aduersus omnes actiones locum habet, et est decimae partis, *praeterquam quod* aduersus adsertorem tertiae partis est.

§ 175. The action of reckless litigation (calumnia) lies against the plaintiff in respect of all actions and is for the tenth part of the value of what he has claimed by action, but in the case of an asserter of liberty it is for a third part.

§ 176. Liberum est autem ei cum quo agitur, aut calumniae iudicium opponere aut iusiurandum exigere, non calumniae causa agere.

§ 176. But it is at the option of the defendant whether he will bring the judicium calumniae or will exact an oath from the plaintiff that he is not bringing the action vexatiously.

§ 177. Contrarium autem iudicium ex certis causis constitui*tur*, ueluti si iniuriarum agatur, et si cum muliere eo nomine agatur, quod dic*a*tur uentris nomine in possessionem missa dolo malo ad alium possessionem transtuliss*e*, et si quis eo nomine agat, quod dicat se a praetore in possessionem missum ab alio quo admissum non esse. sed aduersus iniuriarum quidem action*em* decimae partis datur, aduersus uero duas istas quintae.

§ 177. The Contrary action only lies in certain cases, for instance, against the plaintiff in an action of outrage (injuriarum), and in an action against a widow who having been put into possession of property on account of her conceived but unborn child (ventris nomine) has fraudulently transferred it to some one else, or an action for refusing to admit a person [judgment creditor, damni infecti nomine, etc. Digest 42, 4] put into possession (missio in possessionem) by order of the praetor. In the action of outrage it lies for the tenth of what has been claimed, in the two latter actions for the fifth.

§ 178. Seuerior autem coer*c*itio est per contrarium iudicium. n*am* calumniae iudicio decimae partis nemo damn*a*tur nisi qui intellegit non recte se agere, sed uexandi aduersarii gratia actionem instituit, potiusque ex iudicis errore uel *ini*quitate uictoriam sperat quam ex causa ueritatis; calumnia enim in adfect*u* est, sicut furti crimen. contrario uero iudicio

§ 178. Of these deterrent measures the Contrary action is the more severe. Plaintiff is condemned by the action of vexatious litigation (judicium calumniae) to forfeit the tenth of the value, unless he knows he has no right of action, and has sued to harass his adversary, in reliance on the error or iniquity of the judex, rather than on the justice of his cause; since vexatious litigation, like the crime of theft, consists in

omni modo damnatur actor, si causam non tenuerit, licet *aliqua* opinione inductus crediderit se recte agere.

intention. But in the Contrary action the plaintiff is condemned in any case if he loses the previous action, even though he had some grounds for believing in the goodness of his cause.

§ 179. Vtique autem ex quibus causis contrario iudicio *agi* potest, etiam calumniae iudicium locum habet; sed alterutro *tantum* iudicio agere permittitur. qua ratione si iusiurandum de calumni*a* exactum fuerit, quemadmodum calumniae iudicium non datur, ita et contrarium *dari non* debet.

§ 179. But it is clear that wherever the contrary action (contrarium judicium) lies, the action for vexatious litigation (calumniae judicium) also lies, though one is only allowed to make use of one or other of these actions; on this principle if an oath that the litigation is not vexatious has been exacted, just as the calumniae judicium is not granted, so also the contrarium judicium ought not to be allowed.

§ 180. Restipulationis quoque poena ex certis causis fieri solet; et quemadmodum contrario iudicio omni modo condemnatur actor, si causam non tenuerit, nec requiritur, an scierit non recte se agere, ita etiam restipulationis poena omni modo damnatur actor, si uincere non potuerit.

§ 180. The penalty of the restipulatio also is commonly required in certain cases; and just as in the contrary action the plaintiff is condemned under all circumstances where he loses his cause whether he knew that he had no proper cause of action or did not, even so he forfeits the penalty of the restipulatio in any case if he could not succeed in the action.

§ 181. Qui autem restipulationis poenam patitur, ei neque calumniae iudicium opponitur neque iurisiurandi religio *iniungitur*; n*am* contrarium iudicium ex his causis locum non habere palam est.

§ 181. But when a person suffers the penalty of the restipulation, neither the action for vexatious litigation can be brought against him, nor can he be bound by the religious form of oath; and that in this case the contrary action has no place is obvious.

§ 182. Quibusdam iudiciis damnati ignominiosi fiunt, ueluti furti, ui bonorum raptorum, iniuriarum; item pro socio, fiduciae, tutelae, mandati, depositi. sed furti aut ui ⟨*bonorum*⟩ raptorum aut iniuriarum non solum damnati notantur ignominia, sed etiam pacti, *ut* in edicto praetoris scriptum est; et recte: plurimum enim interest, utrum ex

§ 182. In some actions condemnation involves infamy, as in the actions of theft, rapine (vi bonorum raptorum), outrage (injuriarum), partnership, fiduciary agreement (fiduciae), guardianship (tutelae), mandate, deposit. In actions for theft, rapine, and outrage, it is not only infamous to be condemned, but also to compromise, according to the terms of the praetor's edict; and rightly so since obligation based on delict

delicto aliquis an ex contractu debitor sit. *nec tamen* ulla parte edicti id ipsum nominatim exprimitur, ut aliquis ignominiosus *sit*; *sed qui* prohibe*tur* et pro alio postulare *et* cogni*torem* dare procuratoremue habere, item ⟨*pro*⟩curatorio aut cogni*to*rio nomine iudicio interuenire, ignominiosus esse *dicitur*. Inst. 4, 16, 2.

differs widely from an obligation based on contract. But although there is no express statement that a person is to be infamous in any part of the edict, a person is said to be infamous who is prohibited from appearing in a court of law on behalf of another, from appointing a cognitor or procurator, and from himself serving as cognitor or procurator.

§ 183. In summa sciendum est eum qui cum aliquo consistere uelit ⟨*in ius uocare*⟩ oportere et eum qui uocatus est, si non uen*e*rit, poenam ex edicto praetoris committere. quasdam tamen personas si*ne* permissu praetoris in ius uocare non licet, ueluti parentes patron*o*s patron*as*, item liberos et parentes patroni patronaeue; et in e*u*m qui aduersus ea egerit poena constituitur. Inst. 4, 16, 3.

§ 183. Finally, it is to be noticed that a party intending to sue must serve a summons on his opponent to appear before the magistrate; and if the summons is disregarded, the party summoned forfeits a penal sum according to the provisions of the praetor's edict. Some persons, however, cannot be summoned without the praetor's leave, such as parents, patrons, patronesses, and the children of a patron or patroness; and any one infringing this rule is liable to a penalty.

§ 184. Cum autem in ius uocatus fuerit aduersarius neque *eo* die finiri potuerit negotium, uadimonium ei faciendum est, id est ut promittat se certo die sisti.

§ 184. Upon an appearance before the magistrate, if the proceedings are not terminated on the same day, the defendant must give security (vadimonium) for an adjourned appearance on a future day.

§ 185. Fiunt aut*em* uadimonia quibusdam ex causis pura, id est sine satisdatione, quibusdam cum satisdation*e*, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est ut qui non steterit, is protinus a recuperatoribus in summa*m* uadimonii condemnetur; eaque singula diligenter praetoris edicto significantur.

§ 185. The security is in some cases of a simple kind that is without sureties, in some with sureties, in some cases again it is accompanied by oath, while in some contains a reference to recuperators, so that on default of appearance the defendant may be immediately condemned by the recuperators in the penal sum of the security; all which matters are more particularly explained in the praetor's edict.

§ 186. Et siquidem iudicati depensiue agetur, tanti f*i*t uadimonium, quanti ea res erit; si uero ex ceteris causis, quanti

§ 186. In an action on a judgment debt (judicati), or for money paid by a sponsor (depensi), the sum of the security is equal to

actor iurauerit *non* calumniae causa postulare sibi uadimonium promitti. nec tamen ⟨*pluris quam partis dimidiae, nec*⟩ pluribus quam sestertium C M fit uadimonium. itaque si centum milium res erit, nec iudicati depensiue agetur, non plus quam sestertium quinquaginta mili*um* fit uadimonium.

the sum in question. In other cases it is the amount which the plaintiff swears that he is not vexatiously demanding as necessary to his security, provided that it is not more than half the sum in dispute, nor exceeds a hundred thousand sesterces. If, for instance, the sum in dispute is a hundred thousand sesterces, and the action is not brought to recover a judgment debt or money paid by a sponsor, the penal sum of the security conditioned for reappearance may not exceed fifty thousand sesterces.

§ 187. Q*ua*s autem personas sine permissu praetoris inpune in ius uocare non possumus, easdem ne*c* uadimonio inui*t*as obligare *p*ossumus praeterqua*m* si praetor aditus p*e*rmittat.

§ 187. Those persons who cannot be summoned to appear without leave of the praetor cannot be compelled to give security for the adjourned appearance without similar permission.

§ 171. From the duplication of damages against a defendant who denied his delinquency under the lex Aquilia, 3 § 216, and against a heres charged with a legacy in the form of condemnation, § 9; and from the terms, dare damnas esto = dare judicatus esto, employed both in the lex Aquilia, 3 § 210, comm., and in bequest per damnationem, 2 § 201, it may be inferred with much probability that both the author of unlawful damage and the heir charged with a legacy by words of condemnation were subject, in the older period of the law, to the same proceedings as the judgment debtor (judicatus); that is, in early times were suable by Manus injectio, § 25, and in later times were bound to give satisdatio judicatum solvi, § 102. Cf. Roby, 2. p. 292, and the writers there cited.

Double damages, as a penalty of misrepresentation, were perhaps also an incident of Nexum. Cum ex XII Tabulis satis esset ea praestari quae essent lingua nuncupata, quae qui infitiatus esset dupli poenam subiret, a jureconsultis etiam reticentiae poena est constituta, Cic. de Off. 3, 65. 'While the Twelve Tables were satisfied with requiring compensation for faults against which a mancipator had expressly warranted, and with punishing a false warranty by double damages, the jurists imposed a similar penalty on reticence.'

In Condictio and Constitutum the sponsio was optional (permittitur), § 171; cf. § 13: in Interdicts it was compulsory, § 141. Bethmann-Hollweg, § 96; Lenel, § 95, 2.

§ 175. A charge of calumny implies guilty knowledge or unlawful intention (dolus), the Contrary action implies unlawful ignorance, that is, recklessness or want of consideration (culpa, temeritas).

§ 176. In three personal actions each party was considered as both plaintiff and defendant and had to take both the oath of the plaintiff and the oath of the defendant. Qui familiae erciscundae et communi dividundo et finium regundorum agunt, et actores sunt et rei et ideo jurare debent non calumniae causa litem intendere et non calumniae causa ad infitias ire, Dig. 10, 2, 44, 4. 'In partition of inheritance, dissolution of joint ownership, and determination of boundaries, both parties are equally plaintiff and defendant, and therefore must swear to the good faith of both the suit and the defence.'

In the time of Justinian the action of calumny, the Contrary action, sponsio and restipulation had become obsolete, and in their place the losing party was condemned in costs, and the oath received development, being always administered to both parties and their advocates, Inst. 4, 16, 1. 'Instead of the old checks the oath of the parties and their counsel has been introduced, and the condemnation of the unsuccessful litigant in the costs of his adversary,' Cod. 2, 58. Payment of costs by the loser of the cause was introduced by a law of Zeno, A. D. 486.

§ 184. Vadimonium must be distinguished from the security judicatum solvi. It only referred to reappearance of the defendant in jure, not to appearance before the judex, like the later cautio judicio sisti, and was required whenever there was an adjournment, whereas security judicatum solvi secured satisfaction of the judgment and was only required from the defendant in real actions and in certain exceptional personal actions, § 102. Cf. Keller, § 47.

In procedure by cognitio extraordinaria, the in jus vocatio, summons of the defendant by the plaintiff, was superseded by summons of the defendant by the magistrate through his lictor (evocari a praetore). Obedience to this summons was compelled by a fine of which we have the formula in Gellius, 11, 1. 'As M. Terentius on citation has neither answered nor been excused, I fine him in a single sheep.' If the defendant continued contumacious he was summoned to appear by three proclamations (edicta) at intervals of ten days, and finally an edictum peremptorium was issued in which the magistrate threatened to hear and decide the case in his absence, in default of his appearance, which was done, if he continued disobedient, Dig. 5, 1, 68, &c.

Procedure before a judex was properly called actio, before the praetor, persecutio, Dig. 50, 16, 178, 2. 'Persecutio is the proper

name for extraordinary procedure, as in trusts and other claims which are not triable by an ordinary judex.'

The Libellary procedure which existed in the time of Justinian, having superseded the Formulary procedure, was essentially the same as cognitio extraordinaria. Instead of the summons before the praetor (in jus vocatio) and notice of the action which the plaintiff meant to bring (editio actionis) with which the Formulary procedure commenced, Libellary procedure began with libellus conventionis (at an earlier time with what is called litis denuntiatio, instituted by Marcus Aurelius) and writ of summons. The libellus conventionis was a writing addressed to the court, signed by the plaintiff, stating his cause of action, and binding himself to proceed to Litis Contestatio within two months at latest, or pay twice the costs up to thirty-six aurei, to prosecute the suit to judgment, and pay the costs in the event of losing the cause: it was a form of suing out a writ or summons. Thereupon followed an interlocutor of the court, on its finding a valid cause of action disclosed in the libellus, and this formal document something like an English writ was addressed to the defendant and served on him, not by the plaintiff but by an officer of the court (executor) along with the libellus. The defendant then paid a fee (sportula) to executor proportioned to the amount of the claim; delivered his answer or counter-declaration (libellus contradictionis, responsionis) signed by himself and acknowledging the date of the reception of the libellus; and either gave cautio judicio sisti, security for his appearance in the action for the definitive appointment of the trial (judicio ordinando) and for his continuance to the close of the trial (cautio de re defendenda), or was liable to incarceration. As we have already seen, the action was no longer tried by a judex privatus but by an imperial official. Cf. Muirhead, § 77; Sohm, pp. 315, 316.

Gaius has given us no information concerning Appeal, and very little information has come down to us from other sources as to the origin and development of this kind of jurisdiction under the Principate. (See on this subject Historical Introduction.) Under the republic we hear of no right of Appeal in civil suits: it appears however with the principate, and indeed with the first princeps: and may have been derived from the tribunicia potestas. The jurisdiction may have been only exercised at first in respect of cases belonging to the cognitio extraordinaria of the magistrate, and so not for some time have been applicable to the decisions of private judices. By its extension to these the judex lost the independent position which he held in the time of the republic and was brought under the control of the supreme executive power. The following series of Appeals in civil suits seems to have been instituted: From the Judex to the

Praetor who appointed him: from the Praetor to the Praefectus urbi: from the Praefectus urbi to Caesar. In the provinces a Vir consularis, appointed for the purpose, took the place of Praefectus urbi, Suetonius, Augustus, 33.

For the constitution of the courts in the periods of Legis actio, Formula, Libellus, the student should consult Bethmann-Hollweg's Römischer Civilprozess.

APPENDIX

ADDITIONS AND AMENDMENTS

[The words embodied in the text are distinguished from the conjectural readings by italics.]

Some conjectural readings, principally by Krueger and Studemund and by Huschke, too uncertain for admission into the text, but followed more or less closely in the translation, are here appended.

1 § 43. *Neque plures* quam D servos habentis mentio in ea lege habe*tur*.

1 § 56. Itaque liberos suos in potestate habent cives Romani, *si*, &c., &c.

1 § 73. *Cujus aetatis filius sit*, nisi forte eorum aliquis, qui e lege Aelia Sentia matrimonium se contrahere putarint, erroris causam probare velit; *ab hoc enim*, &c., &c.... *quod ad erroris quoque causam probandam* attinet, anniculus filius esse debeat, sed non semper videri debet generale jus inductum cum *imperator* epistulam ad quendam *dedit*.

1 § 78. *Quod autem diximus inter civem Romanam peregrinumque* contracto matrimonio eum *qui nascitur peregrinum esse, lege Minicia cavetur*, qua lege effectum *est*, *ut* si matrimonium inter cives Romanas peregrinosque non interveniente conubio contrahatur eum qui nascitur peregrini *parentis condicionem sequatur*.

1 § 79. *Adeo autem hoc ita est*, *ut* ex cive Romano et Latina qui nascitur Latinus nascatur, quamquam ad eos, qui hodie Latini nominantur, lex Minicia non pertinet; nam comprehenduntur quidem peregrinorum appellatione in ea lege *non*, &c., &c.

1 § 115 *b*. Si tamen mulier *fiduciae causa*, &c., &c. . . .

1 § 118. nam feminae a *coemptionatoribus eodem modo possunt* mancipari quo liberi a parente mancipantur; adeo quidem, ut quamvis ea sola *apud coemptionatorem filiae loco sit*, quae ei *nupta sit*, tamen *nihilo minus*, &c.

1 § 122. Namque veluti *asses librales erant*, *et dupundii* bilibres, &c., &c.; . . . quamobrem *qui dabat olim*, &c., &c.

1 § 132. At the end, cf. Epit. 1, 6, 3. Tamen cum tertio mancipatus fuerit filius a patre naturali fiduciario patri, hoc agere debet naturalis pater, ut ei a fiduciario patre remancipetur et a naturali patre manumittatur, ut si filius ille mortuus fuerit, ei in hereditate naturalis pater, non fiduciarius, succedat.

1 § 132 *a*. Ei, qui liberum caput e causa mancipii manumittit, eadem jura in ejus bonis competere, quae *patrono in bonis liberti* competunt; for the remainder of the § cf. Epit. 1, 6 § 3 Feminae vel nepotes masculi ex filio una emancipatione de patris vel avi exeunt potestate et sui juris efficiuntur. Et hi ipsi quamlibet una mancipatione de patris vel avi potestate exeant, nisi a patre fiduciario remancipati fuerint et a naturali patre manumissi, succedere eis naturalis pater non potest, nisi fiduciarius, a quo manumissi sunt;

nam si remancipatum eum sibi naturalis pater vel avus manumiserit, ipse ei in hereditate succedit.'

1 § 134. Praeterea parentes, liberis in adoptionem datis, in potestate eos habere desinunt: et in filio quidem, si in adoptionem datur, tres mancipationes *et duae*, &c.

1 § 135 *a*. *Eadem scilicet* dicemus de eo qui ex nepote semel mancipato necdum manumisso conceptus fuerit. *Nam ut supra*, &c., &c.

1 § 136. Praeterea mulieres quae in manum conveniunt, in patris potestate esse desinunt, sed in confarreatis nuptiis de flaminica Diali senatusconsulto ex relatione *Maximi*, &c. And six lines further; Coemptione autem facta mulieres omni modo *potestate parentis liberantur.*

1 § 137. Sicut igitur filiae familias una mancipatione de potestate patris exeunt, ita eae quae in manu sunt una *mancipatione desinunt in manu esse.*

1 § 137 *a*. Inter eam vero *quae* cum extraneo, et eam quae cum viro suo coemptionem fecerit, hoc interest, quod illa quidem *cogere coemptionatorem potest, ut se remancipet, cui ipsa velit*, haec autem virum suum *nihilo magis*, &c., &c.

2 § 14. After *rusticorum*; cf. Epit. 2, 1, 3; Dig. 1, 8, 1, 1; Inst. 2, 2, 3. Praediorum urbanorum jura sunt velut jus *altius tollendi* aedes, et officiendi *luminibus vicini aed*ium, aut *non extollendi, ne luminibus vicini officiatur, item fluminum et stilicidiorum jus*, id est *ut* vicinus flumen vel stillicidium in *aream* vel in aedes suas recipiat; item cloacae immittendae et luminum immittendorum. Praediorum rusticorum jura sunt velut via, iter, actus, item pecoris ad aquam adpulsus, item *jus aquae ducendae.* Haec jura tam rusticorum quam urbanorum praediorum servitutes vocantur.

2 § 14 *a*. Est etiam alia rerum divisio: nam aut mancipi sunt aut *nec mancipi. Mancipi sunt* velut fundus in Italico solo, *item* aedes in Italico *solo* item servi et ea animalia quae collo dorsove domari solent, velut boves equi muli asini; item servitutes praediorum rusticorum. Nam servitutes *praediorum urbanorum nec mancipi sunt.* (Cf. Dig. 1, 8, 1, 1. Inst. 2, 2, 3.)

2 § 15. *sed quod diximus* ea animalia quae domari solent, *mancipi esse*, quomodo intellegendum sit, quaeritur, quia non statim ut nata sunt, domantur. Et nostrae quidem scholae auctores *statim ut nata sunt*, &c.

2 § 66. *etiam* si *occupando ideo* res adquisi*erimus.*

2 § 67. *piscem* ceperimus, quidquid ita *captum* fuerit, id statim nostrum fit, et *eo us*que, &c., &c.

2 § 82. *accipientis s*ine tutoris auctoritate . . . *id est eos petere suos ex jure Quiritium esse*; mulier vero minime hoc modo *repetere potest*, sed ita: dari sibi opor*tere. Unde de pupillo quidem quaeritur*, an si *nummi, quos mutuos dedit, ab eo qui accepit*, consumpti sunt, aliqua *actione eos persequi possit, quoniam* obligationem etiam sine tutoris auctoritate adquirere sibi *potest.*

2 § 111. *quos lex* Papia plus quam dimidias partes hereditatis legatorumque capere vetat, ex militis testamento solidum capiunt. Cf. Inst. 2, 12. Ulp. 20, 10. Epit. 2, 2, 1, &c., &c.

2 § 112. Sed *ex auctoritate*, &c., &c.

2 § 129. After *pronepotes*; nominatim exheredari jubet, feminini vero inter ceteros; qui nisi fuerint ita exheredati, promittit eis contra tabulas bonorum possessionem.

2 § 149 *a*. After *non sit*; cum si *agnati petant hereditatem* exceptione doli mali ex *consti*tutione imperatoris Antonini rem*overi* possint.

2 § 150. Sane *lege Julia* scriptis non aufertur hereditas, si bonorum *possessores* ex edicto constituti sint; nam ita demum *ea lege bona caduca fiunt et ad populum deferri jubentur si defuncto nemo* heres vel bonorum possessor existat.

2 § 151 *a*. After *hereditatem*; per exceptionem doli mali repelletur, si vero nemo ab intestato bonorum possessionem petierit, fiscus scripti heredi quasi indigno auferet hereditatem, ne ullo modo ad eum quem testator heredem habere noluit *perveniat hereditas.*

2 § 235. At the end, *multas similes species* circumspicere *possumus.*

2 § 237. *ideoque* etsi secundum mentem testatoris is qui tutor *datur, poenae nomine*, &c., or *ideoque* quando etiam poenae nomine tutor datus fuerit, &c., &c.

3 § 43. *itaque sive auctor ad testamentum faciendum factus erat*, aut sibi imputare debebat, quod heres ab ea *relictus* non erat, aut ipsum ex testamento, si heres ab ea fac*tus erat, sequebatur hereditas* : . . . *nec enim ullus olim* ab intestato heres vel bonorum possessor erat, qui *possit patronum a bonis libertae* invitum *repellere.*

3 § 44. ergo *ex bonis ejus quae* centum milia sestertiorum plurisve reliquerit patrimonium, si testamentum fecerit, dimidia pars debeatur, si vero intestata liberta decessit tota *hereditas ad patronum pertinet.* But no suitable rendering has been suggested which agrees with the words of the MS.

3 § 46. *Olim quidem eo jure* (utebantur), *quod lege* XII *tabularum patrono datum est*, praetor autem non nisi virilis *sexus patronorum liberos* vocat; filia vero ut contra tabulas *testamenti*, &c.

3 § 69. *patronus* heredes instituerit, ex isdem partibus bona Latini, si patri heredes exis*tant, ad eos pertinere*, &c., &c.

3 § 80. *veluti si* peregrinus sit *bonorum emptor.*

3 § 81. *Item quae debita sunt* ei cujus fuerunt bona, *aut ipse*, &c. . . . *debentur*, et ideo *de omnibus rebus* utilibus actionibus et experiuntur et conveniuntur, quas *in sequenti*, &c.

3 § 95. *Si quis* interroganti Dari Spondes? respondeat Promitto vel Dabo, an recte obligetur; aut *si quis* interroganti Promittis? respondeat Ὁμολογῶ an recte obligetur.

3 § 95 *a*. Cf. Epit. 2, 9, 3. Su*nt et aliae obligationes* quae nulla praecedente interrogatione contrahi possunt.

3 § 103 *a*. *Alia causa est*, si ita stipulatus sim mihi aut Titio *Dari Spondes?* quo casu constat mihi *solidum deberi et me solum* ex ea stipulatione agere posse, quamquam *etiam Titio* solvendo liberaris.

3 § 117. quia enim nobis ut post mortem nostram detur *stipulando*, &c., &c.

4 § 1. Superest ut de actionibus loquamur. Et si quaeramus *quot genera*, &c.

4 § 15. See Huschke's attempted reconstruction of what seems to be an account of the actio sacramenti in personam.

4 § 17 *a*. A leaf of the MS. is missing.

4 § 40. *pars formulae quae* ideo inseritur *ut*, &c., &c.

4 § 61. Inst. 4, 6, 30. In bonae fidei autem judiciis libera potestas permitti videtur judici ex bono et aequo aestimandi quantum actori restitui debeat quo et illud *continetur*, &c.

4 § 66. Krueger and Studemund suggest the following—*itaque si* frumentum aut vinum petat bonorum emptor et invicem defraudatoris nomine pecuniam is debeat, quanto amplius ea pecunia id frumentum aut vinum erit, in condemnatione ponitur; *si vero*, &c., &c.

4 § 111. *aliquando tamen* et perpetuo eas dat, velut quibus *imitatur*, &c., &c.

4 § 114. *absolutoria esse.* diversae scholae auctoribus de strictis judiciis contra placuisse.

4 § 131. *Et quae ante tempus obligationis* in judicium deducuntur, ea neque in condemnationem veniunt neque rursus de iis agere potest.

4 § 131 *a*. *tradi*, vel *tradi*ta ea de evictione nobis caveri, iterum ex empto agere possimus, alioquin si praescribere (obliti) *sumus*, *totius*, &c.

4 § 133. *per unius rei* petitionem universae hereditati praejudicium fieri.

4 § 134. et siquidem ex contractu servorum agatur, *intentione formulae de*terminat*um* [Polenaar, designatum] *est*, *cui dari oporteat.*

4 § 165. *nisi ei res exhibeatur aut restituatur*, quanti ea res erit, adversarius ei condemnetur.

4 § 166. et qui superaverit *fructus licitando*. . . .

de eo inter se certant, utri fructuum perceptio interim committenda est. *Postea alter*, &c.

Ad. Schmidt would read at the end—vel si unus tantum sponsione provocavit alterum, u*na inter eos sponsio.*

4 § 166 *a*. Deinde ab utroque editis formulis sponsionum et *restipulationum judex*, &c., &c.

4 § 170. *Itaque etsi alias potuerit interdicto Uti Possidetis vincere*, tamen *si cetera ex interdicto* facere noluerit, *per interdictum secundarium* possessio in adversarium transfertur.

4 § 171. Nunc admonendi sumus ne facile homines ad litigandum procedant, temeritatem tam agentium quam eorum cum quibus agitur coerceri modo *pecuniaria poena modo jurisjurandi religione* modo metu infamiae.

4 § 172. simplo tenus *obligati sint.*

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